

**SIGNATURE MANAGEMENT TEAM LLC v. DOE:
THE RIGHT TO ANONYMOUS SPEECH POST-JUDGMENT**

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The Sixth Circuit’s recent decision in Signature Management Team LLC v. Doe addressed an issue of first impression in digital privacy law, finding that anonymous internet defendants do not automatically forfeit their First Amendment right to anonymity once they are found liable in a civil lawsuit. The court’s recognition that the right to anonymity can extend post-judgment represents a modest step forward for advocates of the right to remain anonymous; however, some of the rationales and assumptions used to reach this holding could prove detrimental. The court’s formulation of a presumption in favor of unmasking liable defendants introduces a puzzling standard, which fails to adequately protect defendants against the irreversible harm of unwanted disclosure of an anonymous identity. Further, the court’s newly introduced test for balancing the rights of wronged plaintiffs against anonymous defendants misconstrues the nature of the public’s interest in open judicial proceedings, and understates the true value of anonymity to online speakers.

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I. INTRODUCTION

Anonymous speech is one of the core features that makes communication on the internet so unique.¹ Anonymity lends greater freedom to express unpopular opinions without fear of personal retaliation, aids the operations of those who need anonymity to function (like whistleblowers and undercover investigators), and overall encourages a more robust exchange of ideas than would otherwise occur if individuals’ true identities were always linked to their speech.² Courts have long recognized the right to speak anonymously as a fundamental aspect of free speech, a principle

¹ See *Anonymity*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/anonymity> (last visited Mar. 25, 2018).

² *Id.*

which has been extended modernly to protect speakers' rights to participate in anonymous speech online.³

However, anonymous speakers on the internet are not always virtuous actors, and sometimes their online conduct intrudes on the rights of others.⁴ When the conduct of an anonymous speaker is particularly harmful, their victims may seek reprisal in court. Since the advent of the internet, courts have wrestled with both the mechanics and the ethics of lawsuits against anonymous online speakers—specifically, what circumstances justify a court in revealing the identity of an anonymous defendant.⁵ Historically, these issues have arisen when a plaintiff requests that a court disclose the identity of an anonymous online defendant who has wronged them.⁶ Courts have developed a number of tests and factors to consider in determining whether and when a plaintiff's desire to unmask an anonymous defendant supersedes a defendant's First Amendment right to anonymous speech.⁷

To date, these “anonymous speaker privilege” cases have focused on revealing an anonymous speaker's identity during the discovery phase of a lawsuit.⁸ However, a recent Sixth Circuit case has addressed a new and significant corollary: how does the analysis change when the lawsuit is already over, and the anonymous

³ See *id.* (“The US Supreme Court has repeatedly recognized rights to speak anonymously derived from the First Amendment. . . . These long-standing rights to anonymity and the protections it affords are critically important for the Internet.”).

⁴ See Nathaniel Gleicher, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 324 (2008) (“New technology has made harassment more possible and powerful online even as it has empowered modern-day pamphleteers to speak anonymously to ever-growing audiences.”).

⁵ See Marian Riedy & Kim Spurduto, *Revisiting the “Anonymous Speaker Privilege,”* 14 N.C. J.L. & TECH. 249, 249–50 (2012).

⁶ See *id.* at 250 (“During the last decade [courts] have adopted special rules governing the compelled disclosure of the identity of a John Doe defendant in private civil lawsuits when that John Doe is alleged to have committed some wrongdoing online.”).

⁷ See *id.* at 255–70 for an overview of these tests.

⁸ Aaron Mackey, *Court Recognizes First Amendment Right to Anonymity Even After Speakers Lose Lawsuits*, ELECTRONIC FRONTIER FOUND. (Dec. 4, 2017), <https://www.eff.org/deeplinks/2017/12/court-recognizes-first-amendment-right-anonymity-even-after-speakers-lose-lawsuits>.

defendant has lost? *Signature Management Team, LLC v. Doe*⁹ addresses this issue of first impression, and formulates a novel balancing test to help courts determine when an anonymous internet defendant's identity may be disclosed post-judgment. On the whole, the court's holding represents an important recognition of the right to online anonymity.¹⁰ However, the dubious assumptions behind this new balancing test, together with the court's introduction of a new presumption favoring unmasking anonymous defendants, renders this holding only a cautious victory for advocates of anonymous online speech.

Analysis proceeds in four parts. Section II presents a brief overview of the history of the First Amendment right to anonymous speech and provides rationales for why anonymous online speech deserves protection, while engaging with the counter-arguments of advocates of restricting anonymous speech rights. Section III examines the modern growth of the right to anonymous speech on the internet and details the development of the anonymous speaker privilege, which courts use to determine when an anonymous speaker may be unmasked during discovery. Section IV introduces the *Signature Management* case, its holdings and rationales, and emphasizes why its outcome is notable as compared to previous anonymous online speech cases. Section V evaluates the court's holding, maintaining that while its recognition of a continued right to anonymity post-judgment represents a modest success for anonymous speech rights online, the court's rationales are problematic and may be detrimental to the right to anonymity if applied in subsequent cases.

⁹ *Signature Mgmt. Team, LLC v. Doe*, 876 F.3d 831 (6th Cir. 2017).

¹⁰ *Id.* at 835 (“[T]he ability to speak anonymously on the Internet promotes the robust exchange of ideas and allows individuals to express themselves freely without fear of economic or official retaliation.”).

II. THE HISTORY AND RATIONALE: ANONYMOUS SPEECH AND THE INTERNET

A. *Development of the First Amendment Right to Anonymous Speech*

The right to speak anonymously (or pseudonymously)¹¹ is a fundamental First Amendment value which has traditionally been protected in our courts.¹² As a foundation for this right, courts often point to the nation's "respected tradition of anonymity in the advocacy of political causes," stemming from the seminal Federalist Papers, controversial political essays which were penned anonymously to protect their authors from personal backlash.¹³ The first case to recognize that the Constitution guarantees at least a limited right to anonymous speech was *NAACP v. Alabama ex rel. Patterson*.¹⁴ There, the Supreme Court held that the NAACP need not comply with a court order to reveal its membership list, as this would interfere with the organization's right to free assembly and association.¹⁵ *Talley v. California*¹⁶ more formally recognized that the First Amendment right to free speech and freedom of the press encompassed the right to speak anonymously, especially in the context of political speech.¹⁷ In *Talley*, the Court invalidated an ordinance which prohibited leafleting without first registering the names of those who prepared the leaflets, finding that being forced to disclose their identities would burden the leafletters' freedom of expression.¹⁸

¹¹ Much online speech occurs under pseudonyms like usernames, which allow a user to accumulate a history of speech in one location without revealing their true identity.

¹² See Jason Martin & Anthony Fargo, *Anonymity as a Legal Right: Where and Why It Matters*, 16 N.C. J.L. & TECH. 311, 328 (2015).

¹³ See *In re Anonymous Online Speakers*, 661 F.3d 1168, 1172 (9th Cir. 2011).

¹⁴ *NCAAP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

¹⁵ *Id.* at 466.

¹⁶ *Talley v. California*, 362 U.S. 60 (1960).

¹⁷ *Id.* at 64–66 (observing that political speech is a class of speech which is thought to be more deserving of protection under the First Amendment than other classes of speech).

¹⁸ *Id.* at 63.

*McIntyre v. Ohio Elections Commission*¹⁹ was one of the Supreme Court's most decisive statements in support of the right to anonymous speech, finding that a state's prohibition on anonymous campaign literature impermissibly burdened anonymous speech rights.²⁰ In *Watchtower Bible v. Village of Stratton*,²¹ the Court extended anonymous speaker protections beyond the realm of political and associational speech, and developed the beginnings of the modern anonymous speech balancing test: weighing the defendant city's interest in learning the identity of all local canvassers against the defendant's interest in remaining anonymous.²²

The foregoing cases largely constitute the historical basis of the First Amendment right to anonymous speech.²³ In the modern age, many courts have extended these same anonymous speech protections to speech on the internet. The Supreme Court has recognized that there is "no basis" for qualifying or diminishing the level of First Amendment protection that applies to online speech versus traditional speech,²⁴ and these principles have naturally begun to extend to the right to anonymous online speech.²⁵

B. *Why Anonymous Online Speech Deserves Protection*

While most courts have seen little issue with extending First Amendment anonymous speech protections to internet speech, not all courts or legal experts agree that anonymous online speech is a

¹⁹ *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995).

²⁰ *Id.* at 357.

²¹ *Watchtower Bible v. Village of Stratton*, 536 U.S. 150 (2002).

²² *Id.* at 163 ("[O]ur precedent is clear that there must be a balance between [the city's] interests and the effect of the regulations on First Amendment rights.").

²³ See *Martin & Fargo*, *supra* note 12, at 328–31.

²⁴ See *Reno v. ACLU*, 521 U.S. 844, 868–70 (1997) (explaining that the "special factors" which justify lesser First Amendment protection for certain speech mediums like radio or cable broadcasting do not apply in the context of the internet).

²⁵ See Fernando Diaz, *Trolling & the First Amendment: Protecting Internet Speech in the Era of Cyberbullies & Internet Defamation*, 2016 U. ILL. J.L. TECH. & POL'Y 135, 140–43 (2016).

good which is deserving of protection.²⁶ There are various justifications for the philosophies of those who disfavor anonymous online speech. First, some believe that the ubiquitous nature of anonymous online speech actually has a restricting effect on the free and open exchange of ideas.²⁷ On certain internet forums like blogs or message boards, anonymous speech may not aid users in discovering new ideas or searching for truth, but may instead function to merely reinforce existing beliefs, creating an echo-chamber of like-minded people agreeing with one another.²⁸ Anonymity often emboldens these users to act disingenuously, and can discourage engagement with challenging or unfamiliar ideas.²⁹

Some also fear that anonymity enables a host of harmful online behaviors, like harassment, stalking, and defamation, with an almost complete absence of real-world consequences.³⁰ Scholars point to empirical evidence which suggests that online anonymity might actually increase anti-social behavior, due to the lack of accountability users face for their online speech.³¹ While these anonymous online speakers are shielded from liability for their acts, the consequences of their harassment are often deeply felt by their victims in the real world, impacting victims' personal lives and causing them to fear for their safety.³² Research has shown that these

²⁶ See, e.g., Gleicher, *supra* note 4; Bryan Choi, *The Anonymous Internet*, 72 MD. L. REV. 501 (2013).

²⁷ Sophia Qasir, *Anonymity in Cyberspace: Judicial and Legislative Regulations*, 81 FORDHAM L. REV. 3651, 3670–71 (2013).

²⁸ See James A. Gardner, *Anonymity and Democratic Citizenship*, 19 WM. & MARY BILL RTS. J. 927, 940 (2011).

²⁹ See *id.* at 941–42.

³⁰ See Gleicher, *supra* note 4, at 324.

³¹ Psychologists have noted that anonymous communication can have both disinhibiting and deindividuation effects on a speaker, marked by a decrease in self-control and limitations on expressing controversial thoughts, and a greater willingness to engage in anti-social behavior. See, e.g., John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAV. 321 (2004) (noting that Internet users often act differently in cyberspace than they might otherwise); see also Diane Rowland, *Gripping, Bitching, and Speaking Your Mind: Defamation and Free Expression on the Internet*, 110 PENN. ST. L. REV. 519, 530 (2006) (“[A]nonymity is commonly supposed to facilitate unlawful and anti-social behavior . . .”).

³² See Gleicher, *supra* note 4, at 324.

kinds of anonymous online attacks have a particularly sharp effect on minority groups, as racist, homophobic, and sexist speakers revel in the ability to make such anonymous attacks.³³ Targeting minority groups may impoverish the quality of online dialogue even further by discouraging these individuals from participating in certain forums or intimidating them into silence.³⁴

In addition, critics often point out that online anonymity is “a great tool for evading detection of illegal and immoral activity,” and often hampers the efforts of law enforcement in criminal investigations.³⁵ Law enforcement cites online anonymity as a driving force behind many cyber-crimes, such as large-scale data breaches, identity theft, financial crimes, and media pirating.³⁶ Citing this multitude of problems stemming from anonymous online speech, some scholars have suggested heavily regulating anonymous online speech rights, or even banning such speech altogether.³⁷

However, as persuasive as these arguments may appear, regulating, restricting, or banning anonymous online speech rights would overall be far more detrimental than helpful, and would undermine foundational First Amendment rights. While anonymity may enable some unsavory behaviors online, it also serves as a “vital shield to protect valuable speech.”³⁸ Anonymity can make people far more willing to truly speak their mind, lowering participation

³³ See, e.g., Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 64 (2009).

³⁴ See Gleicher, *supra* note 4, at 325.

³⁵ Margot Kaminski, *Real Masks and Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 815, 829 (2013).

³⁶ Jonathan Edelman, *Anonymity and International Law Enforcement in Cyberspace*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 231, 250 (1996).

³⁷ See, e.g., Choi, *supra* note 26 (arguing in favor of restrictively regulating online anonymity, because refraining to do so will harm important liberty interests); Michael Park, *Restricting Anonymous “Yik Yak”: The Constitutionality of Regulating Students’ Off-Campus Online Free Speech in the Age of Social Media*, 52 WILLAMETTE L. REV. 405 (2016) (examining justifications behind schools which have banned students from participating in anonymous online speech on certain social media platforms).

³⁸ Gleicher, *supra* note 4, at 331.

barriers for “unpopular, marginalized, or shy speakers.”³⁹ Many argue that anonymous speech is an essential facet of the democratic process, as it is often the only way for speakers with highly unpopular views to be heard without risking harassment, social ostracization, or loss of employment.⁴⁰

Additionally, online anonymity gives speakers an outlet to air their views without fear that their message will be discounted solely due to their identity. Anonymity allows an audience to evaluate speech based solely on the content of the speaker’s ideas, removing any potential prejudice that an audience may have felt if they knew the speaker’s identity.⁴¹ And just as online anonymity can at times enable bad actors to hide behind anonymous identities, conversely it also allows victims or marginalized individuals to protect themselves from becoming targets—anonymous participation means it will be much harder for victims to be personally targeted for expressing their views online.

Anonymity concerns espoused by law enforcement present a similar double-edged sword—while anonymity allows criminals more of a chance at success, it also allows law enforcement a greater chance to catch them. Law enforcement regularly uses anonymous online interactions to conduct undercover stings and operations, techniques which help thwart criminal undertakings like child pornography, human trafficking, and terrorism.⁴² Anonymity also aids in the reporting of crimes through the use of anonymous tips and hotlines, as many individuals would be entirely unwilling to report certain crimes if disclosing their identity was a prerequisite.⁴³

³⁹ Martin & Fargo, *supra* note 12, at 332.

⁴⁰ See Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL’Y 405, 407 (2003); Qasir, *supra* note 27, at 3668.

⁴¹ See Qasir, *supra* note 27, at 3668 (“[A]nonymity helps ensure that the merits or value of the speaker’s message is not discounted, stereotyped, or prejudged on the basis of the speaker’s characteristics.”).

⁴² See Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment*, 70 MO. L. REV. 387, 402–04 (2005).

⁴³ See 4 WAYNE LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.5(i) (5th ed. 2017).

Online anonymity also allows the communication of critical messages, which would likely not see the light of day if the speaker were forced to disclose their identity. Internet speech is a key forum for whistleblowers, anonymous employees, and public officials who alert the public of high-profile bad acts performed by corporations or governments, helping to increase accountability of these entities to the public.⁴⁴ Online anonymity not only allows speakers to convey these important messages, it allows anonymous users to seek out needed information on controversial or sensitive topics: to seek counseling for mental health problems, research medical concerns, find advice on sensitive legal issues, or otherwise find answers to questions they would not be comfortable asking in person. Additionally, the evidence is still mixed when it comes to suggestions that online anonymity leads to an increase in anti-social behaviors. While some studies cited by opponents of anonymity show this result, other studies show the opposite—that non-anonymous individuals are actually more likely to behave aggressively online than anonymous ones.⁴⁵ Other empirical evidence shows that people worldwide recognize and value the expressive benefits of online anonymity, as some of the most popular websites in the world (such as Reddit⁴⁶ and Tumblr⁴⁷) are centered around anonymous participation models.⁴⁸

⁴⁴ See Ekstrand, *supra* note 40, at 407.

⁴⁵ See Rost, Stahel, & Frey, *Digital Social Norm Enforcement: Online Firestorms in Social Media*, PLOS ONE (2016), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0155923> (finding that users who opted to use their real names online were more likely to engage in aggressive behaviors, especially when discussing controversial issues).

⁴⁶ See Andrew Couts, *State of the Web: Reddit, the World's Best Anonymous Social Network*, DIGITAL TRENDS (Sep. 11, 2012), <https://www.digitaltrends.com/opinion/reddit-worlds-best-anonymous-social-network/> (discussing the merits of Reddit's anonymous participation model).

⁴⁷ *Privacy Policy*, TUMBLR, <https://www.tumblr.com/policy/en/privacy> (last modified June 13, 2017) (detailing the site's pseudonymous username system, which allows users to remain "fairly anonymous").

⁴⁸ See, e.g., Carolina Fairchild, *Anonymity on Reddit May Be Holding the Social Network Back. Its Co-Founder Thinks it's the Only Thing Pushing It Forward*, LINKEDIN (Aug. 15, 2017), <https://www.linkedin.com/pulse/anonymity-reddit-may-holding-social-network-back-its-thinks-caroline/>. Reddit's co-founder believes anonymity is the site's "competitive advantage" over other social media

Just as the public has largely embraced anonymous online speech, many courts have also recognized the importance of this right. The Ninth Circuit has recognized that “the ability to speak anonymously on the Internet promotes the robust exchange of ideas and allows individuals to express themselves freely without fear of economic or official retaliation or concern about social ostracism.”⁴⁹ The Delaware Supreme Court has emphasized that anonymous online speech is “a unique democratizing medium unlike anything that has come before,” allowing “meaningful participation in public discourse” for many people whose voices have historically been silenced due to “financial or status inequalities.”⁵⁰ The Supreme Court has recognized the Internet as a distinctly democratic medium, acknowledging its ability to break down barriers that would normally prevent speakers from fully participating in public discourse.⁵¹

This tendency of courts to regard anonymous online speech as a commodity deserving of protection is reflected by the array of cases that have wrestled with the issue of when and why a court may reveal an anonymous online speaker’s identity against their will. When an anonymous online speaker is charged with committing a crime online, or becomes the subject of a lawsuit due to their online speech, courts are forced to consider how far the right to anonymity can extend when the speaker has committed a legitimate wrong.⁵²

sites, as people often choose to visit Reddit to discuss difficult or personal issues that “they just can’t bring themselves” to discuss on other identity-linked sites like Facebook. *Id.* Anonymity allows its users a sense of authentic and unconstrained personal identity, allowing them to speak their mind freely without worrying “what [their] crazy uncle might think” if they had posted their thoughts on a traditional social media site. *Id.*

⁴⁹ *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011) (internal quotations omitted).

⁵⁰ *Doe v. Cahill*, 884 A.2d 451, 455 (Del. 2005).

⁵¹ *See Reno v. ACLU*, 521 U.S. 884, 870 (1997) (“Through the use of [the Internet], any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox . . . [T]he content on the Internet is as diverse as human thought.”).

⁵² *Diaz, supra* note 25, at 141.

III. THE PRECEDENT: ANONYMOUS SPEAKER PRIVILEGE DURING DISCOVERY

Many cases involving anonymous speech protections for online speakers center on determining the speaker's identity during the discovery phase of a lawsuit. Courts have responded to this issue by adopting a relatively new discovery privilege: the anonymous speaker privilege.⁵³ This privilege can be invoked by a defendant to protect their anonymous identity when they become subject to a civil suit based on their online conduct.⁵⁴ Although the Supreme Court has not specifically addressed issues of anonymous speaker privilege and the internet,⁵⁵ over the years various lower courts have developed a "patchwork of state and federal common law balancing tests" for determining when and how plaintiffs may overcome the anonymous speaker privilege and learn the identity of an anonymous online defendant.⁵⁶ This section presents an overview of these balancing tests, and the underlying rationales upon which courts have relied to justify disclosing—or refusing to disclose—an anonymous speaker's identity during discovery.

A. *The Mechanics of a Lawsuit Against an Anonymous Defendant*

To begin, it may be helpful to provide an overview of the mechanics of a lawsuit against an anonymous defendant, such as an online blogger. First, plaintiffs must overcome jurisdictional hurdles. Obtaining personal jurisdiction over an anonymous defendant is frequently an issue in these suits, as the parties may be in different parts of the country, and may not have sufficient connections to the forum state to provide personal jurisdiction.⁵⁷ However, many states address this issue by employing "long-arm" statutes, which provide for jurisdiction over a defendant in another

⁵³ Riedy & Sperduto, *supra* note 5, at 250.

⁵⁴ *Id.* at 250.

⁵⁵ Diaz, *supra* note 25, at 141 ("To date, the Supreme Court has yet to hear a case where the right to anonymous speech on the Internet has been directly implicated.").

⁵⁶ Martin & Fargo, *supra* note 12, at 370.

⁵⁷ See Jay Zitter, Annotation, *First Amendment Protection Afforded to Blogs and Bloggers*, 35 A.L.R. 407 (2008).

state who commits a tort impacting a citizen of the state.⁵⁸ When a plaintiff wants to sue an anonymous blogger, a common tactic is to institute an action naming a Doe defendant, and then move to compel the blogger's Internet Service Provider (ISP) to disclose the identity of the Internet Protocol address (IP address) holder.⁵⁹ Suing the website host or ISP which hosts the content is generally not a feasible option, as the Communications Decency Act⁶⁰ shields these entities from liability for any user-generated materials posted on their sites.⁶¹ Before granting a motion to disclose, courts often require that the plaintiff show they have first made reasonable, although ultimately unsuccessful, efforts to locate or contact the defendant.⁶² Additionally, ISPs are often reluctant to provide plaintiffs with user account information absent a court order, in an effort to protect their customers from frivolous lawsuits.⁶³ Some ISPs are even prohibited by law from releasing such user information.⁶⁴

⁵⁸ See *id.* at 407 for an example of common characteristics of such long arm-statutes. A common structure is to provide that jurisdiction over the out-of-state defendant may be established if the defendant regularly solicits business in the state, derives substantial revenue from goods or services rendered in the state, or derives substantial revenue from interstate commerce in general, and should reasonably expect that their act will have repercussions in the state. *Id.*

⁵⁹ *Id.* at 407.

⁶⁰ Communications Decency Act, 47 U.S.C. §§ 151–623 (2012).

⁶¹ *Id.* § 230(c)(2)(A). Website hosts and ISPs cannot be held liable for any user-generated content posted on their sites, even if that content is “violent, harassing, or otherwise objectionable.” 47 U.S.C. § 230(c)(2)(A).

⁶² See, e.g., *Doe v. Cahill*, 884 A.2d 451, 451 (Del. 2005).

⁶³ See Ekstrand, *supra* note 40, at 426–27 (examining the “critical new role” of ISPs as “potential defenders of anonymous speech,” and their attempts to balance standing up for the rights of their anonymous users against revealing the identities of users who have committed legitimate wrongs).

⁶⁴ Some ISPs, like TWC and Comcast, are also cable providers, and as such are subject to the regulations of the Cable Privacy Act. This act prohibits cable providers from releasing any “personally identifying” customer information, unless the request is made pursuant to a court order, and the user is notified before disclosure occurs. 47 U.S.C. § 551(c)(2)(B). See also WHITNEY GIBSON, SUBPOENA GUIDE FOR IDENTIFYING ANONYMOUS INTERNET POSTERS (2014), <http://internetdefamationblog.wp.lexblogs.com/wp-content/uploads/sites/297/2014/07/Supoena-Guide-for-Identifying-Anonymous-Internet-Posters.pdf>.

Once the court has received the defendant's identifying information from the ISP, or has otherwise verified the anonymous defendant's identity (for example, through *in camera* review), the court must then determine whether the defendant's identity may be revealed to the plaintiff.⁶⁵ This is where the anonymous speaker privilege comes into play. During discovery, the plaintiff will typically move to compel disclosure of the defendant's identity, and in response the defendant will invoke the anonymous speaker privilege to shield against unwanted disclosure of their identity.⁶⁶ However, the privilege is not absolute—it is qualified, and can be overcome.⁶⁷ What exactly a plaintiff must do in order to overcome this privilege has been the subject of much debate, and courts have developed varying standards that a plaintiff must meet in order to learn the identity of their anonymous defendant.⁶⁸

B. *The Varying Iterations of the Anonymous Speaker Privilege*

The seminal case addressing the anonymous speaker privilege during discovery is *Columbia Insurance Co. v. Seescandy.com*.⁶⁹ The suit involved a trademark infringement claim brought against a domain name, which was registered to an unknown defendant.⁷⁰ When the plaintiff requested that the defendant's identity be disclosed during discovery, the court set out a four-step test that the plaintiff must satisfy in order to learn the anonymous defendant's identity: (1) the plaintiff must identify the anonymous defendant with enough specificity to allow a court to determine whether it has jurisdiction; (2) the plaintiff must demonstrate it has made a good faith effort to locate the defendant; (3) the plaintiff must establish that their suit can withstand a motion to dismiss, on its merits; and (4) the plaintiff must file a discovery request showing specific

⁶⁵ Zitter, *supra* note 57.

⁶⁶ Riedy & Sperduto, *supra* note 5, at 255.

⁶⁷ *Id.*

⁶⁸ *Id.* (“What the party seeking disclosure must show to overcome the [anonymous speaker] privilege has been the subject of more debate than the existence of the privilege itself.”).

⁶⁹ *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999).

⁷⁰ *Id.* at 576.

reasons why revealing the defendant's identity is needed.⁷¹ If the plaintiff accomplishes each of these steps, the court will then engage in a balancing test to determine if the defendant's identity should be revealed, weighing the plaintiff's need to learn the defendant's identity against the "legitimate and valuable right to participate in online forums anonymously."⁷² The court emphasized that these procedural hurdles were necessary to protect against the dangers of unmasking defendants who have potentially done nothing wrong, noting that "[p]eople who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can . . . gain the power of the court's order to discover their identity."⁷³

Subsequently, other courts have expanded upon this pioneering test from *Seescandy.com*. Different courts have set out a variety of different evidentiary showings that plaintiffs must demonstrate in order to learn the identity of an anonymous online defendant, once again relying on the rationale that a defendant's First Amendment right to anonymity should not be overturned hastily, until it is clear the plaintiff actually has a viable case.⁷⁴ In *Dendrite International, Inc. v. Doe No. 3*,⁷⁵ the test was expanded to require that a plaintiff show not just the ability to survive a motion to dismiss, but also must show "sufficient evidence supporting each element of its cause of action, on a prima facie basis," creating a markedly higher standard.⁷⁶ Other courts have similarly raised the necessary showing—in *Doe v. Cahill*,⁷⁷ the court held that a plaintiff seeking to unmask an anonymous defendant during discovery must first

⁷¹ *Id.* at 578. The court formulated this four-part test to "ensure that this unusual procedure will only be employed in cases where the plaintiff has in good faith exhausted traditional avenues for identifying a civil defendant pre-service, and will prevent use of this method to harass or intimidate." *Id.*

⁷² *Id.* at 579.

⁷³ *Id.* at 578.

⁷⁴ Riedy & Sperduto, *supra* note 5, at 255–70.

⁷⁵ *Dendrite Int'l, Inc. v. Doe No. 3*, 342 N.J. Super. 134 (Super. Ct. App. Div. 2001).

⁷⁶ *Id.* at 141.

⁷⁷ *Doe v. Cahill*, 884 A.2d 451 (Del. 2005).

satisfy a summary judgment standard.⁷⁸ The *Cahill* court was concerned about the likelihood that these kinds of suits would intimidate anonymous posters into “self-censoring their comments or simply not commenting at all” if they know that their identities could be easily discovered by anyone who chooses to sue them—hence the court’s insistence that plaintiffs first meet the demanding summary judgment standard.⁷⁹ Thus, courts mostly agree that the anonymous speaker privilege requires plaintiffs to meet some higher showing of proof than is required in an ordinary lawsuit in order to uncover an anonymous defendant’s identity during discovery.

IV. THE CASE: A NEW BALANCING TEST FOR PROTECTING ANONYMITY POST-JUDGMENT

While the general procedure of unmasking an anonymous defendant during discovery is now well established (although the specific evidentiary showing that the plaintiff must meet still depends upon jurisdiction),⁸⁰ until recently no case had yet determined what procedure must be followed when deciding whether to unmask an anonymous internet defendant *after* a judgment has already been rendered.⁸¹ In *Signature Management Team LLC v. Doe*, the Sixth Circuit addressed this issue of first impression in November 2017.⁸² This case required a reconsideration of the anonymous speaker privilege, as the factors which weigh upon a court’s decision to reveal an anonymous identity post-judgment differ considerably from the factors a court considers during the discovery process. During discovery, the courts’ main priority has been protecting the speech rights of

⁷⁸ *Id.* at 460 (“We conclude that the summary judgment standard is the appropriate test by which to strike the balance between a defamation plaintiff’s right to protect his reputation and a defendant’s right to exercise free speech anonymously.”).

⁷⁹ *Id.* at 457.

⁸⁰ See Riedy & Sperduto, *supra* note 5, at 255–70.

⁸¹ Alexis Kramer, *Sixth Circuit Sets Rules for Unmasking Blogger After Judgement*, BLOOMBERG NEWS (Nov. 28, 2017), <https://www.bna.com/sixth-circuit-sets-n73014472562/> (“The decision is the first to consider the circumstances under which a court can protect an author’s anonymity post-judgement.”).

⁸² *Signature Mgmt. Team LLC v. Doe*, 876 F.3d 831, 837 (6th Cir. 2017).

anonymous defendants against potentially trivial or malicious suits, but these considerations disappear in the post-judgment context, where the defendant has already been found liable for some wrong.⁸³

A. *The District Court's Holding*

In *Signature Management*, the Sixth Circuit evaluated the district court's refusal to unmask an anonymous blogger who had been found to have infringed the plaintiff's copyright.⁸⁴ Signature Management Team ("Signature"), a multi-level marketing company⁸⁵ that sells materials designed to help other multi-level marketing businesses succeed, sued Doe for posting their copyrighted materials on his blog.⁸⁶ Doe's blog "Amthrax" is devoted to criticizing multi-level marketing companies, and in January 2013 Doe posted an article including a link to a downloadable copy of one of Signature's copyrighted works, "The Team Builder's Textbook."⁸⁷ Signature served the blog's host with a DMCA takedown notice,⁸⁸ and Doe quickly removed the link from the site.⁸⁹ Nevertheless, Signature proceeded to file suit, alleging one count of copyright infringement, seeking injunctive relief to prevent Doe from publishing any of their works in the future.⁹⁰ When Signature moved to compel discovery of Doe's identity, Doe

⁸³ *Id.* at 835–37.

⁸⁴ *Id.* at 834.

⁸⁵ Multi-level marketing companies (often referred to as "pyramid schemes") are often criticized for their predatory business practices. *Multi-Level Marketing, Pyramid Schemes*, BETTER BUS. BUREAU (Mar. 6, 2018), <https://www.bbb.org/centralohio/industry-tips/read/tip/multi-level-marketing-pyramid-schemes-bbb-tips-66>.

⁸⁶ *Signature Mgmt.*, 876 F.3d at 834.

⁸⁷ *Id.*

⁸⁸ When a copyright holder's material is infringed on the internet, a common first step is to issue a takedown notice to the site's ISP under the Digital Millennium Copyright Act (DCMA). Under the DCMA, if the site "expeditiously" removes the infringing content, the ISP is then granted immunity from liability for any copyright infringement. 17 U.S.C. § 512 (1998).

⁸⁹ *Signature Mgmt.*, 876 F.3d at 834.

⁹⁰ *Id.* Signature sought only injunctive relief, and did not request damages for Doe's infringement.

asserted a fair use defense to the copyright claim, as well as a First Amendment defense of the right to speak anonymously.⁹¹

In determining whether to grant the motion to disclose Doe's identity, the district court relied on the balancing test from *Art of Living Foundation v. Does*.⁹² This test requires that the party seeking disclosure of an anonymous identity first meet a summary judgment standard,⁹³ and if this evidentiary showing is made, the court will then determine if unmasking is warranted by weighing the magnitude of potential harms to both plaintiff and defendant.⁹⁴ Applying this test, the district court declined to unmask Doe during discovery, reasoning that unmasking an anonymous speaker is a significant and irreversible harm, and that there was a chance that Doe would succeed on his fair use defense.⁹⁵ In the end, the district court granted summary judgment for Signature but still refused to unmask Doe, finding that identifying him was unnecessary to ensure that he would not engage in any further infringement of Signature's

⁹¹ *Id.*; see also C.T. Drechsler, Annotation, *Extent of Doctrine of "Fair Use" Under Federal Copyright Act*, 23 A.L.R.3d 139. Unlike a patent, a copyright of a work does not give the copyright owner "the exclusive right to use" the work. *Id.* A fair use defense is essentially a claim that no copyright violation has occurred, as the user was merely engaging in a legitimate and fair use of the work.

⁹² *Art of Living Found. v. Does*, No. 10-CV-05022-LHK, 2011 WL 5444622, at *1 (N.D. Cal. Nov. 9, 2011). This balancing test was developed to address a pre-trial discovery dispute, in which the plaintiff appealed from an order denying his motion to quash a subpoena by the defendant, intended to compel his ISP to reveal his identity. *Id.* The Court concluded that Doe's right to anonymous speech outweighed the plaintiff's need for discovery of his identity. *Id.*

⁹³ This party must produce "competent evidence supporting a finding of each fact that is essential to a given cause of action." *Id.* at 21.

⁹⁴ *Id.* at 13. This involves the court considering the competing claims of injury from both plaintiff and defendant and considering "the effect on each party of the granting or withholding of the requested relief." *Id.* For the defendant, these interests may include the possibility that disclosure will deter the defendants and other anonymous bloggers from exercising their First Amendment rights. *Id.* For the plaintiff, these interests may include whether the plaintiff truly has a need to discover the defendant's identity in order to proceed with their suit (such as when necessary to effect service of process). *Id.*

⁹⁵ *Signature Mgmt.*, 876 F.3d at 835.

works.⁹⁶ Signature then appealed, petitioning the Sixth Circuit to grant its request to identify Doe.

B. *The Sixth Circuit's Holding*

The scope of the issue on appeal was whether and when a court may identify an anonymous defendant post-judgment, after the defendant has been found liable.⁹⁷ The court emphasized that this was a novel question, distinct from typical anonymous defendant cases.⁹⁸ The litany of balancing tests typically used by courts when determining whether to unmask an anonymous defendant during discovery are designed to safeguard against unmasking potentially non-liable defendants, whereas in this context the defendant had already been found liable.⁹⁹

The court first stipulated that in the post-judgment context there exists a presumption in favor of unmasking an anonymous defendant, when that defendant has been found liable and judgment has been entered for the plaintiff.¹⁰⁰ The court's rationale for instating this presumption stems from a factor unconsidered by the district court: the presumption in favor of open judicial proceedings.¹⁰¹ The court emphasized that there exists a strong presumption that judicial records (including the names of litigants) remain open and unconcealed from the public, and only the most compelling reasons can justify non-disclosure of judicial records.¹⁰² The greater the public's interest in the litigation's subject matter, the greater the showing necessary to overcome the general presumption of open public access to court records.¹⁰³

⁹⁶ Signature initially sought a permanent injunction to prevent Doe from infringing any of their works, but the court found a permanent injunction unnecessary to prevent further infringement. *Id.* at 834–35. This is because when the suit began, Doe had certified to the court that he had already destroyed all copies of Signature's works in his possession. *Id.*

⁹⁷ *Id.* at 835.

⁹⁸ *See id.* at 836.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 837.

¹⁰¹ *Id.* at 836.

¹⁰² *Id.*

¹⁰³ *Id.* at 837.

After establishing this principle, the court fully introduced its new three-factor balancing test, to be used in determining whether to unmask an anonymous defendant who has been found liable.¹⁰⁴ For the first two balancing factors, courts must consider the extent of the public's interest in open judicial records, as well as the plaintiff's need to learn the anonymous defendant's identity in order to enforce its remedy.¹⁰⁵ The greater the plaintiff's (and the public's) interest in unmasking a Doe defendant, the more difficult it will be for the anonymous defendant to overcome the presumption of openness and maintain their anonymity.¹⁰⁶ As a third balancing factor, when the anonymous defendant's speech is found to be unprotected by the First Amendment,¹⁰⁷ the defendant must establish that they engage in significant protected, anonymous speech that would be chilled if their identity were disclosed.¹⁰⁸

For the first factor, the public's interest in open judicial records, the court put forth several examples of considerations that may help gauge the extent of public interest in an anonymous defendant's identity.¹⁰⁹ The court provided the example of a libel case, and stated that the public interest in an anonymous libeler's identity would be heightened when the speech is intentionally libelous, made to a large audience, or regarding a matter of public concern, and conversely, that the public interest would be diminished when the speech was merely negligent, read by few people, and on a matter of private or personal concern.¹¹⁰ Similarly, the court explained that in a copyright infringement case, the public's interest would be greater when the material is a "best-selling novel," rather than a "sparsely read instruction manual."¹¹¹

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Certain established categories of speech do not receive First Amendment protection, due to their dangerous or hurtful nature (threats, obscenity, fighting words, defamation, copyright infringement, etc.). *See* U.S. v. Alvarez, 567 U.S. 709, 717 (2012).

¹⁰⁸ *Signature Mgmt.*, 876 F.3d at 837.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

For the second factor, the plaintiff's need to unmask the defendant, the court explained that the presumption of disclosure is stronger when the plaintiff must identify the defendant in order to properly enforce its rights.¹¹² This can be determined by looking to the nature of the remedy.¹¹³ The court reasoned that plaintiffs who are awarded an ongoing remedy, such as a permanent injunction, will have a stronger interest in unmasking (knowing the defendant's identity is necessary to ensure that they continue to comply), whereas a plaintiff who deals with a cooperative defendant, who has already complied with all relief ordered, will have little interest in unmasking.¹¹⁴ Courts may also incentivize anonymous defendants to comply with judgments by conditioning their continued anonymity on satisfaction of the judgment within a specified time frame.¹¹⁵

For the third factor, the defendant's interest in anonymous speech, the court stipulated that an anonymous defendant can challenge the presumption of open records by showing that they engage in substantial protected anonymous speech which would be chilled should their identity be revealed.¹¹⁶ To show this, a defendant may demonstrate that unmasking would "hinder his ability to engage in anonymous speech in the future," by deterring his desire or ability to engage in future anonymous speech.¹¹⁷

However, after laying out all of these guidelines, the court declined to issue a ruling on the merits, instead remanding to the district court to apply this new three-factor balancing test to the specific facts of this case.¹¹⁸ The district court has not yet issued this remanded ruling, and the effects of this new balancing test remain to be seen. The following section presents an analysis of the court's holding in *Signature Management*, and its potential effects on the continued vitality of the right to anonymous speech online.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 838.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 838–39.

¹¹⁸ *Id.*

**V. THE OUTCOME: AN IMPORTANT RECOGNITION OF
ANONYMOUS SPEAKER RIGHTS DESPITE PROBLEMATIC
RATIONALES AND UNCERTAIN RAMIFICATIONS**

Overall, this case represents a modest step forward for the privacy rights of online anonymous speakers. However, some of the rationales underlying the decision are problematic, and could prove detrimental to anonymous speakers' rights if the principles from this case gain traction among other courts.

A. The Good: An Important Recognition

First, the good news. This case represents the first time that a federal appellate court has recognized that First Amendment protections for anonymous online speakers can extend post-judgment—that an anonymous blogger will not automatically lose the right to keep their identity secret just because they have been found liable in a lawsuit.¹¹⁹ Even if a speaker has committed a recognized wrong against the plaintiff, this does not necessarily mean that the speaker must give up her right to anonymity. Although the procedures surrounding unmasking anonymous defendants during discovery were more or less well settled before this case, it remained an open question whether this right to anonymity continued after a defendant was found liable for a civil claim.¹²⁰ The court recognizes the importance of the right to speak anonymously, acknowledging that revealing a speaker's hidden identity can have detrimental, chilling effects on their future speech activities—activities which deserve protection.¹²¹

This recognition is important because, as detailed above, not all courts or legal experts agree that anonymous online speech deserves robust protection.¹²² As indicated by the dissenting opinion in this case, some believe that once a speaker has engaged in unprotected speech on the internet (defamation, copyright infringement, threats, etc.), he should lose all right to keep his identity secret.¹²³ Some

¹¹⁹ See Mackey, *supra* note 8.

¹²⁰ *Id.*

¹²¹ See *Signature Mgmt.*, 876 F.3d at 835–37.

¹²² See *supra* text accompanying notes 26–37.

¹²³ The dissent suggested that because Doe engaged in unprotected speech when he infringed Signature's copyright, his identity should have automatically been

believe that the right to anonymous speech online is actually more detrimental to the marketplace of ideas than it is helpful, and consequently that anonymous online speakers deserve little in the form of protection.¹²⁴

Here, the Sixth Circuit wisely chose not to buy into these rationales, and instead emphasized the importance of the right to anonymous speech. The court explained that the right to anonymous online speech is “paramount to protect the political speech of persecuted groups,” while helping to promote “the robust exchange of ideas and allows individuals to express themselves freely without fear of . . . retaliation.”¹²⁵ In reaching its holding that even guilty defendants do not automatically surrender their right to anonymity, the court took an important stand against the erosion of this foundational right.

B. *The Bad: Problematic Rationales and Uncertain Ramifications*

Next, the bad news. As promising as this black-letter holding may seem at first glance, the court reached this conclusion using some concerning rationales, which may yield unforeseen harmful effects on the right to anonymous speech in subsequent cases.

1. *A Backwards Standard*

Firstly, and perhaps most detrimentally, the court held that when an anonymous defendant is found liable, there exists a *presumption* in favor of revealing the defendant’s identity.¹²⁶ Under this standard, when judgment is entered against a defendant, the default option is to then disclose that defendant’s identity to the plaintiff and the public.¹²⁷ The burden is on the defendant to demonstrate to the court

revealed: no balancing of the defendant’s interests was required, because as soon as Doe “posted that hyperlink” his speech lost all First Amendment protections (including the right to anonymity). *See Signature Mgmt.*, 876 F.3d at 839–40 (Suhrheinrich J., dissenting).

¹²⁴ *See, e.g.*, Gleicher, *supra* note 4 (noting that online anonymity can result in an increase in uncivilized and outrageous behavior, enabling “faceless crowds of online tormentors” to harass targets without consequence).

¹²⁵ *Signature Mgmt.*, 876 F.3d at 835.

¹²⁶ *Id.* at 836.

¹²⁷ *Id.*

why this unmasking is unwarranted, and if they cannot meet this burden, they will be exposed.¹²⁸

Given the court's emphasis on the value of anonymous speech and its concerns with chilling the speech of anonymous defendants, this standard seems backwards. Protecting an individual's constitutional right to anonymous speech should be the default, while the party seeking to reveal the defendant's identity should bear the burden of explaining to the court exactly why this unmasking is warranted, and why they really need to know the speaker's identity. The right to anonymous speech is uniquely fragile, as identifying an anonymous speaker has "irreparable consequences"—once an identity is disclosed, the damage cannot be undone.¹²⁹ This is especially true in the age of the internet, when all of a person's history is permanently on display with a simple search. The court's formulation of this presumption in favor of unmasking does not show sufficient caution when deciding whether to reveal an identity, a move from which there is no going back.¹³⁰

This backwards presumption also creates a further risk of abuse of the legal process simply to intimidate speakers into silence. Past cases have shown that the anonymous speaker discovery process is open to abuse by corporate actors—in *Raytheon v. John Does*, a corporation sued 21 anonymous users of a Yahoo! message board for allegedly disclosing the company's proprietary information.¹³¹ The users, all present or former employees of Raytheon, used the message board to discuss topics like the company's stock price, staffing, and business deals.¹³² However, after the corporation successfully obtained the identities of the 21 individuals from the site, it promptly filed a voluntary dismissal of the suit.¹³³ Online

¹²⁸ *Id.*

¹²⁹ Martin & Fargo, *supra* note 12.

¹³⁰ See *infra* text accompanying notes 121–123 for an example of the kinds of consequences that can befall an individual when their anonymous online identity is revealed.

¹³¹ *Raytheon Drops Suit Over Internet Chat*, ASSOCIATED PRESS (May 22, 1999),

<https://partners.nytimes.com/library/tech/99/05/biztech/articles/22raytheon.html>.

¹³² *Id.*

¹³³ *Id.*

privacy advocates accused the corporation of misusing the power of the courts to obtain the identities of these users, saying that the true object of the suit was to intimidate the anonymous speakers into silence, rather than actually seeking to remedy a legal wrong.¹³⁴ Here, given the court's presumption in favor of unmasking once a defendant has been found liable, this may create an even greater risk that corporations or other powerful actors will abuse the power of the courts to unearth the identities of those who criticize them, seeking not to remedy legitimate wrongs but to frighten their critics into silence.

2. *The Public's Legitimate Interest*

Next, there are several problematic rationales underlying the court's new three-factor balancing test for determining whether an anonymous defendant's identity can be revealed. The first of these factors is the public's interest in open judicial records, and by extension, its interest in learning the anonymous defendant's identity. It is the leap between these two interests which is concerning. The purpose of allowing open access to judicial records is to let the public monitor "what its government is up to," contribute to maintenance of trust in the legal system, and to promote acceptance of judicial outcomes as fair and balanced.¹³⁵ However, it is not apparent that unmasking a defendant who would prefer to remain anonymous will appeal to any of these principles, or engender any sort of increased trust in the system. Rather, it seems that unmasking an anonymous defendant appeals to the public's baser motives—the desire to know who has engaged in what scandalous private acts, to know who is behind which undercover blog, or who is acting as a whistleblower where. Instead of playing to these ignoble interests, the court could better frame this factor of its balancing test by considering only the public's *legitimate* interest in discovering the defendant's identity. Where issues of public importance, politics, current events, or governance are involved, the public may have a very legitimate interest in knowing who was

¹³⁴ David Sobel, *The Process that "John Doe" Is Due: Addressing the Legal Challenge to Internet Anonymity*, 5 VA. J.L. & TECH 3, 15 (2000).

¹³⁵ Mackey, *supra* note 8.

behind certain anonymous speech acts.¹³⁶ However, when learning the defendant's identity would only satisfy the public's desire for gossip, the court should disregard these motivations in favor of protecting a defendant's First Amendment rights.¹³⁷ It seems wiser to consider not just what the public wants to know, but *why* they want to know it.

3. *The Effect of Unmasking on Past and Future Speech*

The court's third balancing factor is the extent to which unmasking an anonymous defendant will chill their future protected speech activities. The court recognized that Doe's anonymous blog was entitled to general free speech protections, but that the copyright-infringing speech featured on his blog was not entitled to such protection. The court was concerned that revealing Doe's identity would impact "both [his] protected and unprotected speech" and "might hinder his ability to engage in anonymous speech in the future."¹³⁸ The court's analysis hinges entirely on Doe's *future* speech—once his identity is revealed, how will his future speech

¹³⁶ See Cynthia Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 1–4 (1990). Under First Amendment case law, it is an established principle that speech on "matters of public concern" is considered to be more deserving of legal protection than speech on matters of merely private concern. *Id.* However, determining which topics are issues of public concern and which are not has been the subject of much debate in the courts. *Id.* How courts make these classifications has raised many questions—does a topic become a matter of public concern simply because most of the public is, indeed, concerned about it, or is matter deemed to be of public concern because it encompasses some topic of intrinsically higher value? *Id.*

¹³⁷ For guidance in determining when an anonymous defendant's speech concerns issues of legitimate public interest, courts may look to prior First Amendment cases discerning between matters of public and private concern. Though the test is somewhat vague, speech is generally considered of public concern when it relates to "any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest." See also *Snyder v. Phelps*, 562 U.S. 443, 453 (2011). Compare *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 761 (1985) (plurality opinion) (finding a report that an individual once filed for bankruptcy to be a topic of private concern), with *Snyder*, 562 U.S. at 454 (determining that the military's policies on homosexuality are of public concern).

¹³⁸ *Signature Mgmt.*, 876 F.3d at 839.

activities be impacted? This rationale, while valid, seems to be missing an important piece of the puzzle—what consequences will befall Doe due to his *past* speech, once his identity is revealed?

Anonymous bloggers often write on topics which are controversial, politically heated, or so deeply personal that authors would never say such things if their name was attached. If an anonymous blogger is unveiled, they may face harsh, real-world consequences for speech which they have already engaged in, to say nothing of the effects on their future speech. As an example of these kinds of consequences, consider the case of *McVeigh v. Cohen*.¹³⁹ There, an anonymous internet user (McVeigh) was “outed” as gay after his ISP disclosed his AOL account information and post history to his employer, the US Navy. He was subsequently dishonorably discharged from the military due to his prior online postings identifying himself as gay. Although McVeigh was eventually vindicated in court years later,¹⁴⁰ he suffered through disastrous real-life consequences after his anonymous online identity was stripped away, losing his job and livelihood, and finding himself ostracized for parts of his identity which he had deeply desired to remain private.¹⁴¹ Notably, he suffered these negative affects entirely due to the content of his past anonymous speech online. This demonstrates that often the most harmful effect of revealing an anonymous internet user’s true identity will stem from speech in which the user has already engaged.

In addition to the repercussions felt by the speaker related to their past speech if their anonymous identity is revealed, their friends and family may also face unpleasant consequences simply by association. Modernly, the right to privacy encompasses not just a speaker’s right to keep her identity secret, but also the rights of those she associates with to not have *their* secrets revealed. Imagine an anonymous blog which focuses on family relationships, which

¹³⁹ *McVeigh v. Cohen*, 983 F. Supp. 215, 219 (D. D.C. 1998).

¹⁴⁰ *See McVeigh v. Cohen*, 996 F. Supp. 59, 61 (D.D.C. 1998) (granting McVeigh’s injunction ordering the Navy to re-instate him to his previous or a similar position).

¹⁴¹ *See Philip Shenon, Sailor Victorious in Gay Case of On-Line Privacy*, N.Y. TIMES (June 12, 1998), <http://www.nytimes.com/1998/06/12/us/sailor-victorious-in-gay-case-of-on-line-privacy.html>.

frequently discusses personal arguments or incidents within the blogger's family. Revealing this blogger's identity would not only injure them, but would also constitute a sharp invasion of privacy for all of their family members, people who perhaps may not even realize they were the subject of a blog. Or in the present case, imagine if the anonymous blogger behind *Amthrax* had family members who work for a multi-level marketing company, whose jobs may be in jeopardy if their employer realizes they associate with someone who has deliberately infringed the company's copyrighted work. Revealing a user's closely-held anonymous identity against their will has a ripple effect, inflicting harm not only upon the wrong-doing user, but upon many individuals in their periphery who have often done nothing to deserve such an invasion of privacy.

The court's framing of the right to anonymity represents that the only impact an unmasking will have is on the defendant's future speech, but this framework seems to seriously misinterpret the true value of anonymity to individuals, and the consequences they may face once that anonymity is lost. A better way to frame this third factor would be to instead consider the degree of consequences, in general, that the defendant would face if their identity is revealed—do they risk endangering their safety or losing their job, or merely embarrassment and annoyance? The extent to which an unmasking will chill future speech should certainly be a consideration in the balance, but not the only consideration.

4. *A Dangerous Precedent for Anonymous Plaintiffs*

A final risk that this decision creates is the possibility that the court's rationales may someday be extended to create a similar presumption of post-judgment unmasking for anonymous *plaintiffs*—parties who often have a very good reason for remaining anonymous during a lawsuit.¹⁴² Although it is uncommon,¹⁴³ courts

¹⁴² See Mackey, *supra* note 8.

¹⁴³ This practice is uncommon because the Federal Rules of Civil Procedure, Rule 10 requires that a complaint “must name of all the parties,” creating a presumption that parties must disclose their names in order to bring a lawsuit. See Jayne Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U. KAN. L. REV. 195, 195 (2004).

have developed a practice of “permitting individuals to sue under fictitious names in certain circumstances.”¹⁴⁴ Similar to the balancing tests which govern the anonymous speaker privilege, courts have come up with a variety of factors that must be balanced when considering whether to allow a plaintiff to file suit anonymously.¹⁴⁵ Generally, this involves balancing the need to protect the privacy of the plaintiff, especially where the subject matter of the case is of a “sensitive and highly personal nature,” against the legitimate interest of the public in knowing the pertinent facts of the case (such as the parties’ identities).¹⁴⁶ Examples of cases in which plaintiffs are often permitted to proceed anonymously include abortion cases, cases addressing the invasion of privacy, and cases involving the victims of crimes.¹⁴⁷

Here, the court’s creation of a new presumption in favor of unmasking an anonymous defendant could have unfortunate consequences if other courts adopt this principle and begin to apply this presumption in the context of anonymous plaintiffs. Given that courts already only allow plaintiffs to proceed anonymously in exceptional cases, an extra assumption in favor of disclosing the plaintiff’s identity post-judgment, should they lose their suit, would present a heavy blow to anonymous plaintiffs. This issue is compounded by the ease of electronic access to court documents in the modern era. In the past, public records like court documents were only available locally, often involving “a treasure hunt around the country to a series of local offices to dig up records.”¹⁴⁸ But with the growth of electronic record systems like PACER,¹⁴⁹ court records are now consolidated into conveniently searchable databases; the minute details of each court proceeding can easily be obtained by

¹⁴⁴ Francis Dougherty, Annotation, *Property and Effect of Use of Fictitious Name of Plaintiff in Federal Court*, 97 A.L.R. FED. 369 (1990).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Daniel Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 MINN. L. REV. 1137, 1139 (2002).

¹⁴⁹ Public Access to Court Electronic Records (PACER) is an electronic public access service provided by the federal judiciary. It allows users to obtain case and docket information from federal appellate, district, and bankruptcy courts.

anyone with an internet connection.¹⁵⁰ Due to the ubiquity of systems like this, once an anonymous identity is disclosed to a court or defendant, it could also become widely known to the public in a very short period of time. If these anonymous plaintiffs run the risk of having their identity openly revealed if they lose their lawsuit, this would likely discourage many from bringing suit in the first place, cutting off access to justice for those who have experienced wrongs of a highly personal or private nature. When plaintiffs are forced to abandon their legitimate claims for fear of their identity being disclosed, this injures not just the individual plaintiffs but society as a whole.¹⁵¹ Society loses the ability to seek justice for victims, to pursue valid claims against dangerous perpetrators, and to create valuable precedent for use in future cases.¹⁵² The right of both plaintiffs and defendants to proceed anonymously is crucial to the workings of the judicial system, and the court's new presumption in favor of unmasking creates a worrisome precedent for the privacy rights of these vulnerable individuals.

VI. CONCLUSION

For now, *Signature Management* represents a measured success for strengthening First Amendment protections for anonymous online speakers. The court's recognition that an anonymous defendant does not automatically forfeit their right to anonymity once they lose a lawsuit is an admirable holding in this issue of first impression. While there still remain some serious concerns about the court's assumptions on the nature of online anonymity, and the case's possible extension to future precedents, as it stands this decision represents a modest success for the right to privacy and unhindered freedom of expression on the internet.

¹⁵⁰ See Ressler, *supra* note 143, at 204.

¹⁵¹ See *id.*

¹⁵² See *id.* at 220 (discussing an example of a female university employee who filed a sexual harassment complaint against the president of the university, but who later chose to withdraw her complaint after learning that the complaint was considered a matter of public record and her identity would have to be disclosed to proceed).