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A SLAPP IN THE FACEBOOK:
ASSESSING THE IMPACT OF STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION ON SOCIAL NETWORKS, BLOGS AND CONSUMER GRIPE SITES

Robert D. Richards¹

I. INTRODUCTION

Until April 5, 2010, Justin Kurtz was just another college student with an axe to grind and a Facebook page on which to grind it.² On that spring day, however, he became the target of a $750,000 lawsuit by a towing company he claims damaged his car and illegally removed a parking decal, resulting in a $118 fee.³ Rather than airing his complaints in court or to a consumer protection agency, Kurtz posted his grievances on a Facebook group he created called “Kalamazoo Residents Against T & J Towing.”⁴ Within two days, the Western Michigan University student had attracted 800 online followers, some of whom weighed in with “comments about their own maddening experiences with

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² Rex Hall, Jr., Western Michigan University Student Sued in Battle with Towing Company: Facebook Group Airing Complaints about T & J Towing Takes Off, KALAMAZOO GAZETTE, April 14, 2010 (noting that the lawsuit was filed against Justin Kurtz on April 5, 2010, in Kalamazoo County Circuit Court).

³ Dan Frosch, Venting Online, Consumers Can Land in Court, N.Y. TIMES, June 1, 2010, at A1 (reporting that “Web sites like Facebook, Twitter and Yelp have given individuals a global platform on which to air their grievances with companies.”).

⁴ Id.
the company." After the site grew to "more than 4,200 followers," the towing company sued, claiming it "had lost numerous business accounts since Kurtz launched the Facebook page." By June 2010, the Facebook group's membership had soared to "nearly 13,900 members." In addition to seeking three-quarters of a million dollars in damages, T & J Towing asked the court to order Kurtz to "immediately cease and desist any further libelous and slanderous written claims’ about the company."8 While at first blush the lawsuit might appear to be a typical litigious reaction by a disgruntled company that fears for its reputation, "[s]ome First Amendment lawyers see the case differently."9 As The New York Times reported in June 2010, "[t]hey consider the lawsuit an example of the latest incarnation of a decades-old legal maneuver known as a strategic lawsuit against public participation, or SLAPP."10 The term SLAPP was coined in the late 1980s by George W. Pring and Penelope Canan at the University of Denver.11 SLAPPs have been described as "civil complaints or counterclaims (against either an individual or an organization) in which the alleged injury was the result of petitioning or free speech activities protected by the First Amendment of the U.S. Constitution."12

5. Id.
6. Rex Hall, Jr., Firm Sues WMU Student Over Facebook Page; Towing Company Seeks $750,000 in Damages for Online Criticism, THE GRAND RAPIDS PRESS, April 14, 2010, at A6 (describing how Kurtz posted on his Facebook page that "his car was legally parked and that he had his complex-issued parking sticker displayed, but that the sticker was missing and the front end of his car was damaged when he reclaimed the vehicle from T & J Towing for a $118 fee").
9. Frosch, supra note 3, at A1.
10. Id.
11. See generally George W. Pring, SLAPPs: Strategic Lawsuits Against Public Participation, 7 PACE ENVTL. L REV. 12 (1989); George W. Pring & Penelope Canan, SLAPPs: GETTING SUED FOR SPEAKING OUT (1996).
national awareness about these frivolous lawsuits, often filed by businesses to quell citizens' speech, led to anti-SLAPP laws in twenty-nine states and legislation currently pending in Congress. Indeed, T & J Towing's lawsuit against Justin Kurtz prompted House lawmakers in Michigan to pass a bill in August 2010 that "would require, with some exceptions, a court to dismiss what are known as strategic lawsuits against public participation, or SLAPPs; require damages and certain fees to be awarded to a prevailing defendant; [and] allow a court to impose additional sanctions against the plaintiff and his or her legal representation.'

In an obvious nod to Kurtz's pecuniary plight, the bill specifically "protects people from retaliatory lawsuits for certain free-speech activities, including what they post on social-networking sites." That provision demonstrates a recognition of the growing usage of these sites, as "[t]wo-thirds of the world's Internet population visit social networking or blogging sites, accounting for almost 10% of all internet time, according to a new Nielsen report 'Global Faces and Networked Places.'"

Kurtz was not merely venting about an isolated personal experience. His message was echoed by Facebook followers who experienced similar issues with the towing company. Moreover, the Better Business Bureau of Western Michigan gave T & J Towing a rating of "F," noting that the "company shows a pattern of complaints in which consumers allege the company towed

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13. Id.
17. Mich. House Takes Aim at SLAPP Suits, THE ASSOCIATED PRESS, Aug. 21, 2010 ("Supporters say it would bar businesses from suing to harass or intimidate people who criticize them. The bill includes protections for postings on sites such as Facebook and Twitter.").
19. See Frosch, supra note 3, at A1.
vehicles in error when either the vehicle had the required parking pass, or the vehicle was not parked in a designated no parking area."

While Kurtz’s case has captured international headlines, it turns out that he is not alone in finding himself a defendant in a lawsuit over remarks he made over the Internet. In fact, he is part of a growing trend of businesses and professionals suing consumers who griped about them online. Jennifer Batoon, a San Francisco marketing manager, used Yelp.com to vent about “a particularly painful visit to the dentist.” Her dentist, Gelareh Rahbar, fought back, first online, saying that Batoon ranted on the Internet only after the dentist “reported her to a credit bureau for a delinquent bill.” Other patients joined the discussion, “mostly praising Rahbar,” but that was not enough. The dentist then sued Batoon “for defamation, charging that the review caused a drop in her revenue.” Batoon said “she was shocked” when the lawsuit was served on her and feared “the prospect of paying tens of thousands of dollars in legal fees.” Fortunately for her, the matter took place in California, a state with one of the nation’s earliest anti-SLAPP laws. Under the terms of that law, a judge

20. Hall, Jr., supra note 6, at A6.
21. See, e.g., Stephen Ottley, Towing the Line, SYDNEY MORNING HERALD, June 4, 2010, at 6 (noting that “Kurtz’s lawyer is contacting the members of the Facebook group to put together a class action lawsuit”); Dan Frosch, Critical Web Postings Produce Spate of Retaliatory Lawsuits, INT’L HERALD TRIB., June 2, 2010, at 21 (observing that “legal experts say the soaring popularity of such sites has also given rise to more cases in the United States like Mr. Kurtz’s, in which a business sues an individual for posting critical comments online”); Michael Kesterton, Social Studies, GLOBE & MAIL, June 1, 2010, at L6 (reporting that “[t]he towing company’s lawyers said the page had unfairly damaged its reputation”).
23. Id.
24. Id.
25. Id.
26. Id.
27. See California Anti-SLAPP Project, http://www.casp.net/statutes/calstats.html (last visited Mar. 26, 2011) (noting that California’s law “was first
dismissed the defamation counts and ordered the dentist “to pay $43,000 for Batoon’s legal fees.”

Batoon was not the first Yelp.com user to face a defamation suit. San Franciscan Christopher Norberg was sued by his chiropractor in February 2008 after complaining on Yelp.com that the doctor had dishonest billing practices. Norberg, who sought Dr. Steven Biegel’s services after being injured in a car accident, was upset to learn that the chiropractor had billed his insurance company for $550 instead of the $125 amount that Biegel had quoted him. After receiving a letter from Biegel’s lawyer “threatening him with a lawsuit over the review,” Norberg removed his rating and review of the chiropractor. Apparently that did not satisfy Biegel, who sued his former patient for defamation the following month.

In similar fashion, Chicago resident Amanda Bonnen used her Twitter account to complain about mold in her apartment, which provoked the landlord to sue her. Horizon Group Management, LLC sought $50,000 in damages from Bonnen after she tweeted: “Who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it’s okay.” The company alleged in the lawsuit that it “was a company of good name, fame, and reputation and was deservedly held in high esteem by and among renters, potential renters and the general public” until Bonnen “wrongfully published the false and defamatory Tweet on Twitter, thereby allowing the Tweet to be distributed throughout the world.” As a result, the company claimed it was “greatly injured in its enacted in 1992).

28. Id.
30. Id.
31. Id.
32. Id.
33. Lisa Donovan, Tenant’s Twitter Slam Draws Suit, CHICAGO SUN-TIMES, July 28, 2009 (noting that the lawsuit claims the “Twitter posts ‘maliciously and wrongfully’ slammed her apartment”).
35. Id. at ¶¶ 3, 8.
reputation as a landlord in Chicago.” Jeffrey Michael, a company spokesperson, said Horizon Group Management “never had a conversation [with Bonnen] about the post and never asked her to take it down.” Instead, he quipped, “We’re a sue first, ask questions later kind of an organization.” A judge dismissed the case in January 2010.

Indeed, Jeffrey Michael’s attitude is representative of that of a SLAPP filer. Winning the lawsuit is not the objective of a SLAPP. Rather, the goal is achieved by “sinking a critic deep into legal fees even if the court will eventually toss the case.” As USA Today observed about SLAPP in June 2010, “[t]he Constitution guarantees a right to express opinions, even outlandish ones, as long as the facts are right. But the right has no meaning if people fear being bankrupted by the cost of defending themselves. In the process, the public stands to lose a useful source of information.”

First Amendment lawyer Marc Randazza, “who has defended clients against suits stemming from online comments,” illustrated that point by conceding “that sometimes the most pragmatic approach for a SLAPP defendant is to take back the offending comments in lieu of a lawsuit.” Randazza “helped one client, Thomas Alascio, avoid a lawsuit [in 2009] after he posted negative remarks about a Florida car dealership on his Twitter account.” Alascio wrote of the car dealer: “There is not a worse dealership on the planet.” Randazza deflected a threatened lawsuit by responding in a letter to the dealership, stating “that although Mr.

36. Id. at ¶ 9.
37. Donovan, supra note 33.
38. Id.
40. Jason Beahm, Social Media Complaints, Defamation & SLAPP Suits, REUTERS, June 4, 2010 (noting that “many states have enacted laws against SLAPP suits . . . which require the business to pay the defendant’s legal fees if the case is dismissed”).
41. Want to Complain Online?, supra note 22, at 8A.
42. Frosch, supra note 3, at A1.
43. Id.
44. Id.
45. Id.
Alascio admitted that the dealership might not be the worst in the world, his comments constituted protected speech because they were his opinion.\textsuperscript{46} The damage caused by SLAPPs is not merely legal. SLAPPs can take a physical and psychological toll on the defendants as well. University of Denver sociologist Penelope Canan has studied the effect of SLAPPs and noted that “SLAPP targets routinely report that the lawsuit is ‘one of the most life-changing experiences they have ever had.’ The legal gymnastics they are put through often translate into physical problems.”\textsuperscript{47} Canan further suggested that “although the physiological disorders associated with SLAPP are similar to those connected to other stress-related illnesses, one social behavior is peculiar to SLAPP: ‘the demise of the belief in American justice.’”\textsuperscript{48}

The incidents described above all share one important characteristic: easily identifiable targets. Yet, in an age of anonymous and pseudonymous postings on blogs, social networks and consumer gripe sites, the SLAPP lawsuit has taken on an even larger nefarious purpose – unveiling the identity of the anonymous poster. This latest, technology-driven phenomenon is called CyberSLAPP. A coalition of groups that advocate freedom of expression online, including the American Civil Liberties Union,\textsuperscript{49} the Center for Democracy and Technology,\textsuperscript{50} the Electronic

\textsuperscript{46} Id.

\textsuperscript{47} See Robert D. Richards, Freedom’s Voice: The Perilous Present and Uncertain Future of the First Amendment 11 (1998) (observing that “Canan also found that after being SLAPPed – or even just learning about such lawsuits – citizens are less like to become involved in public issues”).

\textsuperscript{48} Id.

\textsuperscript{49} See About the ACLU, http://www.aclu.org/about-aclu-0 (last visited Dec. 4, 2010) (noting “[t]he ACLU is our nation’s guardian of liberty, working daily in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country”).

\textsuperscript{50} See Center for Democracy and Technology, http://www.cdt.org/about (last visited Dec. 4, 2010). The Center describes its mission as: “The Center for Democracy and Technology is a non-profit public interest organization working to keep the Internet open, innovative, and free. As a civil liberties group with expertise in law, technology, and policy, CDT works to enhance free expression and privacy in communications technologies by finding practical and innovative
Frontier Foundation, the Electronic Privacy Information Center and Public Citizen is working to combat the efforts of corporations that will file "a frivolous lawsuit just so they can issue a subpoena to the Web site or Internet Service Provider (ISP) involved, discover the identity of their anonymous critic, and intimidate or silence them." As the coalition's website describes them, "CyberSLAPP cases typically involve a person who has posted anonymous criticisms of a corporation or public figure on the Internet."

While corporations engaging in this practice undoubtedly are doing so for pragmatic reasons — fishing for potential defendants — the tactic has consequences, namely a very real threat to the time-

solutions to public policy challenges while protecting civil liberties. CDT is dedicated to building consensus among all parties interested in the future of the Internet and other new communications media." Id.

51. See Electronic Frontier Foundation, http://www.eff.org/about (last visited Dec. 4, 2010) ("From the Internet to the iPod, technologies are transforming our society and empowering us as speakers, citizens, creators, and consumers. When our freedoms in the networked world come under attack, the Electronic Frontier Foundation (EFF) is the first line of defense. EFF broke new ground when it was founded in 1990 — well before the Internet was on most people's radar — and continues to confront cutting-edge issues defending free speech, privacy, innovation, and consumer rights today. From the beginning, EFF has championed the public interest in every critical battle affecting digital rights.").

52. See Electronic Privacy Information Center, http://epic.org/epic/about.html (last visited Dec. 4, 2010) ("EPIC is a public interest research center in Washington, D.C. It was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values.").

53. See Public Citizen, http://www.citizen.org/Page.aspx?pid=2306 (last visited Dec. 4, 2010) (observing that "Public Citizen serves as the people's voice in the nation's capital. Since our founding in 1971, we have delved into an array of areas, but our work on each issue shares an overarching goal: To ensure that all citizens are represented in the halls of power").

54. See CyberSLAPP.org, http://www.cyberslapp.org/about/ (last visited Dec. 4, 2010) (noting that "[t]he groups have advocated a legal standard for courts to follow in deciding whether to compel the identification of anonymous speakers, requiring notice, an opportunity to be heard, and the right to have claims of wrongdoing both specified and justified on the facts before identities are revealed").

55. Id.
honored tradition of anonymous speech. The U.S. Supreme Court has recognized that anonymous speech plays an important role in the expressive fabric of society. In *McIntyre v. Ohio Election Commission*, the Court observed:

The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.

Indeed, courts have highlighted the importance of the role of anonymous speech in this nation’s history, suggesting that “[t]hroughout the revolutionary and early federal period in American history, anonymous speech and the use of pseudonyms were powerful tools of political debate. The Federalist Papers (authored by Madison, Hamilton, and Jay) were written anonymously under the name ‘Publius.’”

As more and more public discussion migrates to the Internet, the burden of SLAPPs on the free flow of information becomes increasingly evident. SLAPP suits threaten to chill a popular form of expression, namely, social networking sites and blogs. Moreover, if corporations are permitted to unmask anonymous and pseudonymous online posters of information, an expressive

56. See, e.g., *Talley v. California*, 362 U.S. 60, 64 (1960) (suggesting “anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. 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”).
58. Id. at 341-42.
59. Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) (observing also that “[t]he anti-federalists responded with anonymous articles of their own, authored by ‘Cato’ and ‘Brutus,’ among others”).
concept that is older than the country itself stands threatened.

This article examines the recent phenomenon of using Strategic Lawsuits Against Public Participation to quell expression on social networking sites and other popular online postings. Part II traces the increasing numbers of SLAPPs and the policy response to them by states that have created laws or judicial doctrine to combat this legal tactic. Part II also reviews the legislation currently pending in Congress and explores whether these measures are effective when applied to online expression. Part III then examines recent efforts to use subpoena power to reveal the identities of anonymous and pseudonymous posters to social networking sites, blogs and consumer gripe sites, and the impact such legal maneuvering has on the First Amendment. Finally, Part IV concludes by assessing the threat to online free speech posed by Strategic Lawsuits Against Public Participation and argues in favor of passage of a federal measure that will reduce the chill of online expression through some of the most popular technological formats in modern times.

II. USING LITIGATION TACTICS TO STRANGLE EXPRESSION: THE EVOLUTION OF STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION

In one of the earliest published court opinions involving a SLAPP, New York Judge Nicholas Colabella described the litigation tactic this way: "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined." Judge Colabella was presiding over a case that pitted real estate investor Allan S. Gordon against the not-for-profit Nature Conservancy, a group that had "opposed the subdivision of a 36-acre parcel of property owned" by Gordon. Specifically, the investor brought an action "to contest an exemption from real property taxes granted by the Town of New Castle to the

60. Infra notes 63-122 and accompanying text.
61. Infra notes 123-174 and accompanying text.
62. Infra notes 175-195 and accompanying text.
64. Id. at 651.
Conservancy” for a parcel of land near the Mianus River Gorge Wildlife Refuge and Botanical Preserve.65

In recognizing that the lawsuit brought by Gordon was in retaliation for the Nature Conservancy’s previous opposition to his plans to subdivide his land, Judge Colabella labeled the case a SLAPP.66 Moreover, his opinion succinctly laid out the danger to free expression posed by this type of lawsuit:

SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense. The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism.67

As discussed above, the SLAPP filer does not have to win the lawsuit to accomplish his objective.68 Indeed, it is through the legal process itself – dragging the unwitting target through the churning waters of litigation – that the SLAPP filer prevails. Judge Colabella observed, “Needless to say, an ultimate disposition in favor of the target often amounts merely to a pyrrhic victory.”69 The costs of defending a lawsuit – financially and emotionally – leave a lasting stain on the individuals involved and the “ripple effects of such suits in our society [are] enormous.”70

65. Id.
66. Id. at 656.
67. Id. (FN omitted).
68. See RICHARDS, supra note 47, at 15 (suggesting that “[t]he lawsuit’s purpose is realized through the process. Causing problems for the SLAPP target is the actual goal - depositions, interrogatories, wondering what is next all contribute to a heightened anxiety and often cause a retreat from public opposition to the filer’s project”).
70. Id. (noting that “[p]ersons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent”); see also, RICHARDS, supra note 47, at 11
The court clearly recognized that "[t]hose who lack the financial resources and emotional stamina to play out the ‘game’ face the difficult choice of defaulting despite meritorious defenses or being brought to their knees to settle."

The public attention garnered by early cases helped to propel the issue into the minds of legislators across the country, resulting in anti-SLAPP laws in twenty seven states, and pertinent case law precedent in two others. Nonetheless, the utility of anti-SLAPP laws varies widely among the states. For instance, Pennsylvania, while being counted among the twenty seven states with relevant statutes, narrowly limits the application of its anti-SLAPP law to provide immunity to someone who “makes an oral or written communication to a government agency relating to enforcement or implementation of an environmental law or regulation . . . .” As written, the law would have had little or no utility to any of the social networking defendants or blog posters mentioned in the Introduction, had they resided in Pennsylvania.

In other states, where the laws are more broadly applicable, anti-SLAPP statutes can provide some measure of protection. In

71. Gordon, 590 N.Y.S.2d at 656.
California, for instance, the law covers a wide swath of expression and has protected individuals who posted unflattering comments on online bulletin boards and complaint sites. In *Global Telemedia International, Inc. v. Doe 1*, a publicly-traded telecommunications company sued several individuals for comments they posted on the Raging Bull Message Boards. As the district court explained, “Raging Bull is a financial website that organizes individual bulletin boards or ‘chat-rooms,’ each one dedicated to a single publicly traded company.” The court further observed that the content of the messages — most posted using pseudonyms — varies widely, ranging from relatively straightforward commentary to personal invective directed at other posters and at the subject company to the simply bizarre. For example, one exchange includes “joemeat, you are one of the stupidest suckers that ever posted here” to which “joemeat” responded “akita: that means so much coming from a degenerate who speaks regularly from his lower orifice."

Global Telemedia International, Inc., unhappy with the “less-than-flattering postings” about the company, sued the online commentators “for trade libel, libel per se, interference with contractual relations and prospective economic advantage against several posters.” These causes of action are typical for SLAPPs. Two of the SLAPP targets successfully petitioned for

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75. See CAL. CIV. CODE § 425.16(a) (West 2010).
78. 132 F. Supp. 2d at 1264.
79. Id.
80. Id.
81. Id.
82. See, e.g., California Anti-SLAPP Project, http://www.casp.net/slapps/mengen.html (last visited Dec. 7, 2010) (noting that “[t]ypically, SLAPPs are based on ordinary civil tort claims such as defamation, conspiracy, and interference with prospective economic advantage”).
removal from state to federal court and then moved for dismissal under California’s anti-SLAPP law. The pair argued that the suit was “brought against them as a ‘transparent effort to intimidate and silence individuals who are critical of Plaintiffs’ corporate performance.’” The district court agreed, noting that the California statute

provides that an ‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with public issue includes: . . . (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.’

In finding that the “postings were an exercise of their free speech in connection with a public issue,” the court then shifted the burden back on the company to demonstrate a likelihood of success on its claims. The company was not able to meet that burden because, as the court observed, “the format of [the defendants’] statements strongly suggests that postings are opinions.” In fact, in considering the context of the statements, the court found,

The statements were posted anonymously in the general cacophony of an Internet chat-room in which about 1,000 messages a week are posted about GTMI. The postings at issue were anonymous as are all the other postings in the chat-room. They were part of an on-going, free-wheeling and highly animated exchange about

84. Id.
85. Id. at 1265.
86. Id. at 1266.
87. Id. at 1267.
GTMI and its turbulent history.\textsuperscript{88}

California's law — "commonly recognized as the nation's strongest"\textsuperscript{89} — is particularly useful in combating SLAPPs for several reasons. First, it requires a quick disposition by the court on whether a particular lawsuit is considered a SLAPP. Defendants who are sued in a SLAPP action can file a special motion to strike within sixty days of the filing of the complaint.\textsuperscript{90} The law then requires the court to schedule a hearing on the motion not more than thirty days after it is served.\textsuperscript{91} Significantly, during the time the motion is pending, all discovery is stayed.\textsuperscript{92} That provision quickly deprives the SLAPP plaintiff of a valuable weapon — ratcheting up the defendant's legal fees with multiple levels of discovery, a tactic that often is used to figuratively beat the SLAPP target into submission.\textsuperscript{93}

Additionally, the law is expansive in its protection over a wide range of speech. Under the pertinent California Civil Code provision,

A cause of action against a person arising from any act of that person \textit{in furtherance of the person's right of petition or free speech} under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.\textsuperscript{94}

\textsuperscript{88} \textit{Id.}


\textsuperscript{90} \textit{CAL. CIV. CODE} § 425.16(f).

\textsuperscript{91} \textit{Id.}

\textsuperscript{92} \textit{Id.} at § 425.16(g).

\textsuperscript{93} Richards, \textit{supra} note 47, at 11 (explaining that the SLAPP filer's "goal is to use intimidation tactics to throw an organized effort off balance, if not dissolve it completely").

\textsuperscript{94} \textit{CAL. CIV. CODE} § 425.16(b)(1) (emphasis added).
The law further defines "act in furtherance of a person's petitioning or speech" this way:

As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes:

(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;

(2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;

(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest;

(4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.95

Moreover, the California statute provides, with limited exceptions, that "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs."96 Those costs can be considerable and serve as a deterrent

95. Id. § 425.16(e).
96. Id. § 425.16(c)(1) (noting in subsection (c)(2) that "A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall
for filing a SLAPP.

In January 2010, for instance, California Superior Court Judge Verna A. Adams awarded nearly $54,000 in attorneys' fees and costs to a blogger for Boing Boing Gadgets, a "technology-based posting of www.BoingBoing.net." Blogger Rob Beschizza wrote about MagicJack, "a portable product that allows the customers to use a standard telephone, corded or cordless, or a handset/microphone combination phone to make local and long distance calls" through the Internet. The pertinent language of his pejorative postings about MagicJack and its end-user licensing agreement (EULA) was as follows:

- "MagicJack’s EULA says it will spy on you";

- "[MagicJack] will also snoop on your calls to target ads more accurately";

- MagicJack practices "systematic privacy invasion"; and

- "[t]he 'look how many people came for a free trial' counter on the homepage is a fake, a javascript applet that increments itself automatically."

On March 11, 2009 MagicJack sued the blog’s sponsor,
claiming the statements were "libelous on their face." The lawsuit also included a count of unfair competition under California law. The defendant countered with a special motion to strike, declaring "[t]his is precisely the type of bad-faith strategic lawsuit that the California legislature sought to prevent when it enacted the anti-SLAPP statute." The defendant further argued that MagicJack "brought this lawsuit...for only one reason: to put a stop to public debate and criticism concerning MagicJack's unusual and invasive end-user license agreement." Judge Adams agreed and dismissed the case "on the merits." The case was completed through final judgment in less than ten months.

It bears repeating, however, that states do vary widely in terms of the degree of protection. As mentioned in the Introduction, Justin Kurtz's towing-company complaint case motivated lawmakers in that state to craft anti-SLAPP legislation in August 2010. Under the bill, if a court dismisses a case because it is determined to be a SLAPP, the target will get the following, not insignificant, damages:

(A) Three times the amount of damages sustained by the defendant as a result of the action.

(B) Court costs of the action.

(C) Reasonable attorney fees and other expenses incurred in defending against the action.

101. Id.
102. CAL. BUS. & PROF. CODE § 17200 et seq. (Deering 2009).
104. Id.
(D) If the amounts awarded under subdivisions (A) to (C) total less than $5,000.00, the difference between the total and $5,000.00.

(E) Additional sanctions against the plaintiff and the attorney or law firm representing the plaintiff as the court determines are sufficient to deter the plaintiff and the attorney or law firm from filing similar actions. ..106

Clearly, the Michigan legislature intended to send a strong message to SLAPP filers. But not all states take such a firm stand against this legal tactic. Comparing, for example, California's broad anti-SLAPP law with Pennsylvania's restriction to communication "relating to enforcement or implementation of an environmental law or regulation" aptly illustrates how the degrees of protection given to citizens can vary widely from state to state. For that reason, speech and petitioning advocates are now seeking a federal solution to the vexing national problem of citizens facing protracted litigation simply for speaking out.

On December 16, 2009, Rep. Steve Cohen (D. – Tenn.) introduced the "Citizens Participation Act of 2009."108 The purpose of the bill is "[t]o protect first amendment rights of petition and free speech by preventing States and the United States from allowing meritless lawsuits arising from acts in furtherance of those rights, commonly called 'SLAPPs.'"109 One of the congressional findings in the measure cuts to the heart of why anti-SLAPP protection is needed, noting "it is in the public interest for individuals, organizations and businesses to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of

107. Supra note 74.
108. H.R. 4364.
109. Id.
One of the criticisms often levied against anti-SLAPP legislation is that it denies citizens access to courts to resolve disputes. Cohen's congressional website answers that criticism, observing “[t]his bill does not shut the courthouse door to those with valid claims, but instead provides an expedited process for filtering out suits designed to intimidate and harass citizens exercising their First Amendment rights.” Consequently, the federal law would be qualified by the actual malice standard. Best known as a constitutional privilege in defamation law, actual malice presents a high threshold for a plaintiff to reach. As First Amendment scholar Robert M. O’Neil described the standard, “[i]n practice, meeting that test has turned out to be a rather daunting task that has thwarted many a lawsuit in which lay observers would have said the publisher has acted ‘maliciously’ but a court ruled that much more must be established to meet the legal standard.”

Parsed differently, by including the actual malice standard in the law, Congress would leave the door open for legitimate lawsuits, but set the bar for recovery at a high enough level to protect all speakers except those who hurled deliberate falsehoods into the public debate.

110. Id. § 2(5).
111. *See* RICHARDS, *supra* note 47, at 23 (noting that “[o]pponents to these measures argue that the right to sue is severely curtailed by such legislation. They contend that everyone is entitled to his or her day in court”).
113. H.R. 4364, sec. 3(a) (emphasis added).
114. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice”-- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”).
The bill also borrows from those states with the strongest protection by creating a special motion to dismiss – one that must be filed within forty-five days after the claim is filed in federal court or fifteen days after the case is removed from state to federal court.116 Moreover, “[u]pon the filing of a special motion to dismiss, discovery proceedings in the action shall be stayed until notice of entry of an order disposing of the motion.”117 Similar to those stronger state laws, the federal bill also establishes that “[t]he court shall award a moving party who prevails on a special motion to dismiss or quash the costs of litigation, including a reasonable attorney’s fee.”118

The federal bill differs from most state measures in two important respects. First, it provides for the removal of the SLAPP suit from state to federal district court.119 Second, it seeks to curtail fishing expeditions by SLAPP filers who use compulsory process to learn personal identifying information in an attempt to locate more defendants. Specifically, Cohen’s bill provides that “[a] person whose personally identifying information is sought in connection with an action pending in Federal court arising from an act in furtherance of the constitutional right of petition or free speech may make a special motion to quash the discovery order, request or subpoena.”120 This provision would be particularly useful in the online context where anonymity is now being threatened by the CyberSLAPP filer who hopes to find more targets – i.e., defendants – by issuing a subpoena for Internet protocol addresses and other identifying information from a webmaster.

Mark Goldowitz, director of the California Anti-SLAPP Project, an organization that helped draft the federal bill, observed, “Just as petition and free speech rights are so important that they require specific constitutional protections, they are also important enough to justify uniform national protections against SLAPPs.”121 Some

117. Id. § 5(c).
118. Id. § 8(a).
119. Id. § 6(a).
120. Id. § 7(a).
121. Ashby Jones, Online Venters Rejoice: Federal Anti-SLAPP Law Taking
online users are hoping the high-profile nature of SLAPP cases like Justin Kurtz's will propel federal lawmakers into action. As Network World opined, “[t]he good news is that the publicity surrounding this case may help motivate lawmakers in Washington to finally pass a federal law that will protect free-speech rights – online and off – from unmerited legal retaliation by deep-pocketed businesses.” A similar bill is expected to be introduced in the Senate in early 2011.

III. CYBERSLAPPS AND THE GROWING DISCOVERY THREAT TO ANONYMOUS SPEAKERS: ROUNDRING UP POTENTIAL TARGETS THROUGH COMPULSORY PROCESS

As the U.S. Supreme Court observed in McIntyre, anonymous speakers are motivated by myriad reasons. Despite these varied motivations, anonymous speech contributes to the public discourse in important ways. Accordingly, when a litigant seeks to discern the identity of the anonymous speaker, the First Amendment is at risk. This is particularly true for speech in cyberspace because, as one federal court observed: “The right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas.” As one legal commentator pointed out, “[t]he technology and culture of the Internet multiplied exponentially the number of anonymous speakers contributing to public discourse.”

122. Paul McNamara, Congress Needs to Pass Anti-SLAPP Legislation, NETWORK WORLD, June 7, 2010, available at http://www.networkworld.com/columnists/2010/060710-net-buzs (noting that “[a] number of states already have laws that attempt to deter this type of legal intimidation, but a federal version is necessary given the nature of the Internet and this country’s well-established sue-first mentality”).

123. See supra note 57 and accompanying text.


125. Lyrissa Barnett Lidsky, Anonymity in Cyberspace: What Can We Learn from John Doe?, 50 B.C. L. REV. 1373, 1376 (2009) (suggesting that when “[f]aced with a growing number of anonymous speech cases, many courts have
is noted that so-called CyberSLAPPs present a unique threat to anonymous and pseudonymous speech on the Internet.126 Launching a dragnet, through the mechanism of a subpoena,127 in an effort to unmask a roster of potential SLAPP defendants may indeed constitute an abuse of the litigation process.

Logically, at least in the twenty-nine states that have created a solution by either statute or case law,128 CyberSLAPPs should fall under their state's anti-SLAPP law, and the protections of those measures should be brought to bear on the lawsuit. As discussed in detail in Part II, these laws help by dismissing cases found to be SLAPPs, by immunizing the speech of the people who have spoken out on a particular issue, and by allowing for the recovery of attorney's fees and costs, once the court determines that the lawsuit was filed for improper reasons (e.g., retaliation or closing off debate).129 Importantly, these laws often require that discovery be stayed while the court considers the early motions to strike the lawsuit, thus lessening the burden of mounting legal fees.130

In addition to the efforts of the free-speech groups discussed in the Introduction,131 to protect against the use of subpoenas to glean the identities of anonymous posters, California stepped out ahead of the curve by enacting specific safeguards against subpoenas for “personally identifying information” when the underlying lawsuit involves the exercise of free speech rights.132 After California not only developed new legal doctrines to address the issues raised by the Doe cases, but have also made existing doctrines responsive to the culture of Internet discourse”).

126. See supra notes 44-51 and accompanying text.
127. See Susanna Moore, The Challenge of Internet Anonymity: Protecting John Doe on the Internet, 26 J. MARSHALL J. COMPUTER & INFO. L. 469, 472 (2009) (observing that “[i]f the website where the offending material is found has a registration component to it, the plaintiff may ask the website for the information the party provided at registration”).
128. See supra notes 72-73..
129. See, e.g., CAL. CIV. PROC. CODE § 425.16 (Deering 2011) (providing for a claim “arising from ‘act in furtherance of person's right of petition or free speech under United States or California Constitution in connection with a public issue’”).
130. Id. § 425.16(g).
131. Supra notes 49-55..
Governor Arnold Schwarzenegger signed the measure into law in October 2008, the Electronic Frontier Foundation observed,

One of the most pernicious threats to anonymity is the filing of trumped-up lawsuits as an excuse to force ISPs to reveal speakers' identities. Once such a lawsuit is filed, speakers who want to protect their anonymity must find a way to pay a lawyer to go to court and prevent disclosure of their personal information. That can be a real hardship—in fact, even the threat of having to go to court may discourage many people from speaking out in the first place.

Given California's long history of battling these frivolous lawsuits, further strengthening the state's already useful anti-SLAPP statute to combat CyberSLAPPs is a logical next step to protect new media forms. Indeed, the state's law has long proven useful in protecting traditional media outlets. As California First Amendment lawyer Charity Kenyon suggested,

> You just ask the plaintiff who is threatening to sue a newspaper or television station for defamation to sit down and read the statute and explain to their client that if they lose this motion to strike, they are going

person whose personally identifying information... is sought in connection with an underlying action involving that person's exercise of free speech rights” may seek a protective order from a court. The law went into effect Jan. 1, 2009).

133. See About Electronic Frontier Foundation, http://www.eff.org/about (last visited Dec. 4, 2010) (describing how “EFF broke new ground when it was founded in 1990 — well before the Internet was on most people's radar — and continues to confront cutting-edge issues defending free speech, privacy, innovation, and consumer rights today.”).


135. See RICHARDS, supra note 47, at 20 (describing the early process of getting anti-SLAPP legislation passed in California).
to pay your attorney’s fees. In most cases now you can just persuade them not to file the action at all. It’s a very powerful tool which has essentially eliminated defamation actions against newspapers and television.136

As discussed above, both the legislation pending in Michigan137 and in Congress138 specifically single out new media for added protection. Other states should follow that lead in carving out protection. Without such safeguards, speakers who don’t wish to reveal their identities will be greatly compromised. Legislatures looking to enhance protections in this area should explore what courts have done when faced with challenges to subpoenas designed to reveal the identities of anonymous online posters.

The importance of anonymous speech has been recognized for centuries,139 but social networks, blogs and consumer sites require a whole new level of analysis, for the “[t]he poster’s message not only is transmitted instantly to other subscribers to the message board, but potentially is passed on to an expanding network of recipients, as readers may copy, forward, or print those messages to distribute to others.”140 As technology grows, so too does the potential for widespread misinformation. Yet, courts, on balance, find the value of allowing such speech outweighs the potential adverse consequences.

Indeed, courts have found that anonymous speech helps to level

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136. See Miller, supra note 89, at 23.
137. See supra note 15 and accompanying text.
138. See supra note 113 and accompanying text.
139. See, e.g., Talley v. California, 362 U.S. 60, 64 (1960) (“Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. 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.”); McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 342 (1995) (“[A]n author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.”).
140. Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231, 237 (Ct. App. 2008) (warning that “no one is truly anonymous on the Internet, even with the use of a pseudonym” because Internet Service Providers can trace posters’ identities).
The internet is a unique democratizing medium unlike anything that has come before. The advent of the internet dramatically changed the nature of public discourse by allowing more and diverse people to engage in public debate. Unlike thirty years ago, when “many citizens [were] barred from meaningful participation in public discourse by financial or status inequalities and a relatively small number of powerful speakers [could] dominate the marketplace of ideas” the internet now allows anyone with a phone line to “become a town crier with a voice that resonates farther than it could from any soapbox.”

Speakers need not identify themselves for Democracy to thrive. As the court in Doe v. 2TheMart.com, Inc. observed, “[t]he ‘ability to speak one’s mind’ on the Internet ‘without the burden of the other party knowing all the facts about one’s identity can foster open communication and robust debate.’”

On the other hand, this notion of the importance of anonymity does raise an important question: If someone or some company is actually defamed by an anonymous poster, should the defamed party have an opportunity to learn the identity of that poster through the ordinary tools of litigation, such as a subpoena? After all, Section 230 of the Telecommunications Act of 1996

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141. Id.
142. 884 A.2d 451 (Del. 2005).
143. Id. at 455 (footnote omitted).
145. Id. At 1092 (citation omitted).
146. 47 U.S.C. § 230 (2006) ("No provider or user of an interactive
forecloses, in most instances, holding the Internet Service Provider accountable. As a result, should the ISP have to cooperate with a subpoena designed with the specific intent of revealing identifying information about the poster? Does the subpoena amount to little more than a “fishing expedition” designed to identify potential SLAPP targets?

No doubt this issue will continue to occupy the attention of judges, such as U.S. District Judge Thomas S. Zilly, who wrote:

The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously. If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights. Therefore, discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts.147

If the standard rules of civil discovery apply, this clearly would undermine anonymous speech on the Internet. Instead, the law is trending toward a heightened standard for courts to apply when litigants issue a subpoena in an attempt to unmask anonymous posters. This heightened approach safeguards First Amendment interests while, at the same time, helping to ensure fairness for parties and potential parties. An early case on point, Dendrite International, Inc. v. Doe, No. 3,148 provided some guidance for

147. Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1093-94, 1093 (W.D. Wash. 2001) ("In the context of a civil subpoena issued pursuant to Fed. R. Civ. P. 45, this Court must determine when and under what circumstances a civil litigant will be permitted to obtain the identity of persons who have exercised their First Amendment right to speak anonymously. There is little in the way of persuasive authority to assist this Court. However, courts that have addressed related issues have used balancing tests to decide when to protect an individual's First Amendment rights.").

handling subpoenas seeking identity of anonymous and pseudonymous posters:

The trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.\textsuperscript{149}

The \textit{Dendrite} court balanced "the equities and rights at issue."\textsuperscript{150} First, the plaintiff must "undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application."\textsuperscript{151} Second, the plaintiff must "identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech."\textsuperscript{152} Third, "[t]he plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant."\textsuperscript{153} Finally, "the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed."\textsuperscript{154}

Similarly, the court in \textit{Cahill} adopted the \textit{Dendrite} requirement of demonstrating a prima facie case – typically relevant at the

\begin{itemize}
\item \textsuperscript{149} \textit{Id.} at 760.
\item \textsuperscript{150} \textit{Id.} at 761.
\item \textsuperscript{151} \textit{Id.} at 760 (setting out further that "[t]hese notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board").
\item \textsuperscript{152} \textit{Id.}
\item \textsuperscript{153} \textit{Id.}
\item \textsuperscript{154} \textit{Dendrite}, 775 A.2d at 760-61 (assuming that "the court concludes that the plaintiff has presented a prima facie cause of action")..
\end{itemize}
motion to dismiss level – but did so in the context of the necessary showing at the summary judgment stage. In short, the court observed, “before a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process he must support his defamation claim with facts sufficient to defeat a summary judgment motion.” Nonetheless, at least one court has found it “unnecessary and potentially confusing to attach a procedural label, whether summary judgment or motion to dismiss, to the showing required.”

But what happens in a case in which someone is seeking the identity of anonymous posters who are not parties to a lawsuit? In Doe v. 2TheMart.com, Inc., the U.S. District Court established four factors that must be considered. Noting that “non-party disclosure is only appropriate in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker,” U.S. District Judge Zilly wrote:

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

158. Id. at 1095 (observing that “[w]hen the anonymous Internet user is not a party to the case, the litigation can go forward without the disclosure of their identity”).
Given that social networking and blogging opportunities continue to increase, these cases are not likely to go away. Accordingly, courts recognize the need to provide a detailed roadmap for lower courts that increasingly will be called upon to resolve such issues. In Independent Newspapers, Inc. v. Brodie, the Maryland Court of Appeals, that state's highest court, illustrated that precise point when it granted certiorari prior to any proceedings in the Court of Special Appeals to address the following question: “May a court breach the constitutional right to speak anonymously and order the identification of Internet speakers who are alleged to have violated the plaintiff’s rights without a factual and legal showing that the plaintiff has a supportable claim on the merits?”

The court also “recognize[d] the complexity of the decision to order disclosure regarding pseudonyms or user names in the context of the First Amendment.” Setting out Maryland’s rule, the state’s high court acknowledged that it borrowed from “the standards employed by many of [its] sister courts.” Specifically, the court instructed trial judges facing a defamation action that involves anonymous speakers or pseudonyms to:

1. require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, including posting a message of notification of the identity discovery request on the message board;

2. withhold action to afford the anonymous posters a reasonable opportunity to file and serve

159. Id.
160. 966 A.2d 432 (Md. 2009).
161. Id. at 435.
162. Id. at 443.
163. Id. at 456.
opposition to the application;

(3) require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster, alleged to constitute actionable speech;

(4) determine whether the complaint has set forth a prima facie defamation per se or per quod action against the anonymous posters; and

(5), if all else is satisfied, balance the anonymous poster’s First Amendment right of free speech against the strength of the prima facie case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant’s identity, prior to ordering disclosure.164

The test in Brodie, which incorporated the Dendrite/Cahill prima facie case requirement, reflected the trend of adhering to this basic showing. Yet, in 2011, the United States Court of Appeals for the Ninth Circuit suggested that such a showing may be too restrictive if the expression at issue falls into the category of commercial speech.165 That three-judge panel pointed out the distinction between protecting anonymity in speech characterized as political as opposed to purely commercial. The court observed,

Given the importance of political speech in the history of this country, it is not surprising that courts afford political speech the highest level of protection . . . . Commercial speech, on the other hand, enjoys a limited measure of protection,

164. Id. at 456 (citation omitted).
commensurate with its subordinate position in the scale of First Amendment values," as long as "the communication is neither misleading nor related to unlawful activity."\textsuperscript{166}

While declining to decide if the speech at issue in the instant case could be classified as commercial speech,\textsuperscript{167} the court of appeals suggested that "the nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes."\textsuperscript{168} Moreover, the court added that "in discovery disputes involving the identity of anonymous speakers, the notion that commercial speech should be afforded less protection than political, religious, or literary speech is hardly a novel principle."\textsuperscript{169} The case raises some crucial questions for the future of anonymous online posters, particularly if the Ninth Circuit's reasoning becomes widely adopted elsewhere. For instance, will these lesser standards apply to anonymous speakers who complain on consumer gripe sites, such as Yelp.com or other sites that are more commercial in nature?

Although social networking and online venting is a relatively new development, courts understand that "anonymity or pseudonymity has been a part of the Internet culture"\textsuperscript{170} from the outset, and safeguarding the ability to communicate in such fashion, given the "magnitude of the protection of anonymous speech under the First Amendment,"\textsuperscript{171} is pivotal to the future of Internet speech. As the \textit{Brodie} court recognized, "posters have a First Amendment right to retain their anonymity and not to be subject to frivolous suits for defamation brought solely to unmask their identity."\textsuperscript{172}

The balancing approach for revealing the identity of Internet posters may be one way to guard against this practice if courts

\textsuperscript{166} \textit{Id.} at \textsuperscript{*7}(citations omitted).
\textsuperscript{167} \textit{Id.} at \textsuperscript{*18}.
\textsuperscript{168} \textit{Id.} (citations omitted).
\textsuperscript{169} \textit{Id.} (citation omitted).
\textsuperscript{171} \textit{Id.} at 440.
\textsuperscript{172} \textit{Id.} at 449.
adopt a good-faith requirement as the district court did in Doe v. 2TheMart.com, Inc. Judge Zilly borrowed from other courts grappling with these issues and included, as a threshold part of the test, a requirement that “the subpoena seeking the information was issued in good faith and not for any improper purpose.” That condition cuts directly to the heart of SLAPP actions, which, by their very nature, are not brought in good faith.

IV. CONCLUSION

In fall 2010, Sony Pictures released the movie The Social Network. In the first five weeks of its release, the film grossed $79.7 million and garnered critical acclaim. In the movie, “[t]he birth of Facebook and how it revolutionized communication, turned Mark Zuckerberg into a billionaire and created ‘friends,’ plus personal and legal complications are chronicled.” The popularity of the film itself mirrors the rapid growth of and enthusiasm toward Facebook that exist today.

Yet, the larger legal concerns today are looming from outside the social networks’ inner circle – specifically, third parties who are suing users directly in an effort to shut them up, close them down, or teach them a costly lesson. The weapon – SLAPP – has been a tactic for decades, but the proliferation of online targets such as Facebook pages, blogs and consumer gripe sites, has breathed new life into this disfavored litigation practice.

SLAPPs aimed at online discussion pose a particularized threat not only to the technology-driven marketplace of ideas but also the centuries-old notion of anonymous speech. As U.S. District Judge Stuart Dalzell wrote in one of the earliest court decisions regarding the Internet, “It is no exaggeration to conclude that the Internet has

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173. Supra note 54.  
174. Id. at 1094.  
177. Movie Guide, PIT. POST-GAZETTE, Nov. 4, 2010, at W-16 (rating the film at three and a half out of a possible four stars).  
178. Id.  
179. See supra note 16.
achieved, and continues to achieve, the most participatory marketplace of mass speech that this country— and indeed the world— has yet seen.”180 As with the Internet itself, unquestionably, Facebook and other social networking sites and blogs have revolutionized communication, but as with all new technologies, their development also raises a host of legal problems. Endemic to the instant technology are the challenges brought on by anonymous postings.

While courts have long touted the efficacy of anonymity, a recent Supreme Court decision suggests it is indeed grounded in the Constitution. In a concurring opinion in Doe No. 1 v. Reed,181 Justice Antonin Scalia characterized the Court’s opinion as acknowledging a “First Amendment right to anonymity.”182 The Court, more than a decade earlier, had ruled that the government could not force people who circulate petitions to wear name-identification badges, noting “[t]he injury to speech is heightened for the petition circulator because the badge requirement compels personal name identification at the precise moment when the circulator’s interest in anonymity is greatest.” Without question, as discussed above in detail,183 this country’s endearment toward anonymous speech dates back centuries— long before the advent and evolution of the Internet.

The ubiquity of online sites and networks, and the very nature of their split-second streaming of speech across state lines and national boundaries, requires a larger scale, federal solution to the increasing SLAPP problem rather than a patchwork of state statutes of varying utility and availability. Anti-SLAPP laws are a critical tool in defending against this type of litigation because they “allow for easy dismissal of meritless lawsuits that clog up the court system and threaten a person’s right to free speech.”184

182. Id. at 2831 (Scalia, J., concurring).
183. See supra note 59 and accompanying text.
184. See Miller, supra note 89, at 22 (discussing the provisions of SLAPP laws, including the special motions to dismiss that “can be filed early in the court proceedings and would give the judge authority to decide if a case has any merit or is just an attempt to silence a critic”).
Representative Steve Cohen, the prime sponsor of the recent attempt to nationalize SLAPP protection, aptly observed in support of his bill, “The First Amendment is a federal issue and I think we should look at protecting peoples’ First Amendment rights at the federal level and not depend on the states to do it.”185 The federal bill includes “a simple process for victims of SLAPP suits to make a motion to dismiss, stop discovery, recover attorney’s fees in the event that the claim is deemed meritless and remove to a federal court to determine if the lawsuit qualifies as a SLAPP suit.”186 As discussed above,187 the legislation also contains a provision that will be particularly useful in the online community: A special motion to quash the discovery order, request or subpoena that is designed to reveal the identity of an anonymous poster.188

While the federal legislation addresses the threat to anonymous postings in this provision, it does not go far enough in providing guidance to the district courts. To this end, the bill should set forth a specific Dendrite/Cahill189-type test that must be applied in cases seeking the identity of anonymous speakers. By codifying the standard, Congress would preclude district courts from developing a patchwork of applicable tests throughout the country.

It should be recognized that not everyone is a fan of anti-SLAPP laws, and attempts to pass a federal bill face some strong opposition. Bruce Fein, who served as associate deputy attorney general and as general counsel to the Federal Communications Commission during the Reagan Administration, sharply criticized early attempts to codify protections, writing: “Self-government and free speech are tarnished, not strengthened, by citizens indifferent to truth. They should be unwelcome in the corridors of government. Anti-SLAPP laws that invite citizen lies about business are a sad commentary on contemporary understanding of the vital ingredients of healthy democracy.”190

185. *Id.* at 23.
186. *Id.*
187. See *supra* notes 113-116 and accompanying text.
188. *Supra* note 113.
189. See *supra* notes 141-156 and accompanying text.
190. Bruce Fein, *Code Green for Impunity*, WASH. TIMES, Oct. 7, 1992, at G1 (suggesting that “[t]he need for truth is at its zenith in public meetings, legislative hearings, and other fora intended to influence government policy.”)
Indeed, strong business lobbies have been successful in blocking or slowing down the passage of these laws on the state level. In Florida, for example, it took more than a decade for an anti-SLAPP law to be put in place, and “[t]he major force against the legislation in Florida was a lobbying group representing small and big businesses called the Associated Industries of Florida (AIF).”¹⁹¹ The group issued a report that countered the Florida attorney general’s office study on the issue and “questioned the actual injuries to the targets of SLAPP” that were included in the government’s report.¹⁹²

Still, the stories of those citizens, such as Jennifer Batoon¹⁹³ and Rob Beschizza,¹⁹⁴ who benefited directly from the strong state anti-SLAPP statute in California, should serve as a catalyst for moving the federal bill forward. People should not be forced to spend years toiling through a protracted litigation process – draining their financial resources – just because they wanted to inform others about a product or service they found objectionable. Anti-SLAPP laws prevent the use of litigation as a club to beat speakers into submission while, at the same time, protecting any party’s right to use the court system to resolve legitimate disputes. As the popularity of social networks, blogs and consumer gripe sites – accessible throughout the country and around the world – continues to grow, it is clear that the state-by-state approach to anti-SLAPP laws is far too random and safeguards against these bad-faith lawsuits should be extended nationwide through federal law.

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¹⁹¹. See Richards, supra note 47, at 21.
¹⁹². Id.
¹⁹³. See supra notes 22-28 and accompanying text.
¹⁹⁴. See supra notes 97-105 and accompanying text.