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## In the Matter of Ottinger v. Non-Party The Journal News

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*New York Law School Class of 2010*

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# In the Matter of Ottinger v. Non-Party The Journal News

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With the explosive proliferation of online blogs and message boards,<sup>1</sup> the ability to post anonymously has triggered a new breed of defamation lawsuit targeting many different people with the same name: John Doe.<sup>2</sup> While the First Amendment has long protected the anonymous speaker's right to free speech,<sup>3</sup> that protection may not be as robust when the speaker is accused of defamation online.<sup>4</sup> Indeed, the anonymous John Doe, who identifies himself by a "screen name"<sup>5</sup> or by no name at all, may not be anonymous in an online defamation case.<sup>6</sup> Although a plaintiff must still convince a judge to force the host of the website that carries allegedly defamatory material to unmask the anonymous poster,<sup>7</sup> courts across the country have only just

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1. See Technorati: State of the Blogosphere 2008, <http://technorati.com/blogging/feature/state-of-the-blogosphere-2008/> (last visited Dec. 28, 2009). Since 2002, Technorati has tracked the creation of 133 million new blogs, and it continues to count an average of 1.5 million new blogs created each week. *Id.*
  2. See, e.g., *Dendrite Int'l v. Doe*, No. 3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).  

Information contained in postings by anonymous users of [online] message boards can form the basis of litigation instituted by an individual, corporation or business entity under an array of causes of action, including breach of employment or confidentiality agreements; breach of a fiduciary duty; misappropriation of trade secrets; interference with a prospective business advantage; defamation; and other causes of action.

*Id.* at 759–60; see also Media Law Resource Center: Legal Actions Against Bloggers, <http://mlrcblogsuits.blogspot.com> (last visited Dec. 28, 2009) (listing hundreds of lawsuits that have been filed against bloggers nationwide. In eight of those cases, bloggers were ordered to pay a total of \$16,092,500 in damages to people they wrote about in their blogs). *But see* Glenn Harlan Reynolds, *Libel in the Blogosphere: Some Preliminary Thoughts*, 84 WASH. U. L. REV. 1157 (2006) (discussing how the number of libel suits targeting blogs is actually quite small compared to the massive and increasing number of blogs and message boards).
  3. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). "Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the *Bill of Rights*, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *Id.* (citations omitted).
  4. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) ("It has been well observed that [defamatory] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").
  5. "A 'screen name' is an identity created by a user. It may or may not bear any correlation to the user's real name." *United States v. Grant*, 218 F.3d 72, 73 n.1 (1st Cir. 2000). *But see* Ryan M. Martin, Comment, *Freezing the Net: Rejecting a One-Size-Fits-All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuits*, 75 U. CIN. L. REV. 1217 (discussing how "computer technologies track and store the minutest [sic] details about a speaker's activity online, [so] no one is truly anonymous on the internet").
  6. See, e.g., *Dendrite*, 775 A.2d at 756; see also Allison Stiles, *Everyone's A Critic: Defamation and Anonymity On the Internet*, 2002 DUKE L. & TECH. REV. 4 (2002) (discussing the inconvenience and added expense of pursuing a libel suit against an anonymous defendant).
  7. See generally Jennifer O'Brien, Note, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 FORDHAM L. REV. 2745 (2002) (discussing the process by which libel plaintiffs must seek assistance from internet service providers to identify anonymous posters).

begun to consider what standard to apply before ordering such a disclosure.<sup>8</sup> The decision is challenging because the standard must protect an anonymous speaker's right to free speech on the Internet while at the same time ensuring that parties injured by defamation have access to an adequate remedy.<sup>9</sup>

In *In re Ottinger v. Non-Party The Journal News*,<sup>10</sup> the Supreme Court of New York, Westchester County, adopted a standard to apply when deciding whether to compel a web host to identify anonymous individuals accused of posting defamatory statements on an online blog.<sup>11</sup> Noting the lack of precedent on the issue,<sup>12</sup> the *Ottinger* court adopted a test from a neighboring jurisdiction.<sup>13</sup> The test first requires the plaintiff to make a prima facie showing of each element of libel,<sup>14</sup> and then requires the court to "balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented."<sup>15</sup> While the test adopted in *Ottinger* is more deferential to anonymous speakers than previous tests of its kind,<sup>16</sup> the *Ottinger* court added a problematic caveat for when, as here, the test is applied to cases involving a libel plaintiff who is a public figure. To prevail on a libel claim, a public figure libel plaintiff must prove an additional element of actual malice.<sup>17</sup> However, the *Ottinger* court explicitly held that evidence of actual malice is not necessary for a public figure libel plaintiff to unmask an anonymous poster's identity.<sup>18</sup> This is a critical error because merely obtaining the identity of an anonymous critic is a form of remedy in itself for public figure libel plaintiffs who may seek only to harass

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8. See, e.g., *Doe No. 1 v. Cahill*, 884 A.2d 451 (Del. 2005).
  9. See *Chaplinsky*, 315 U.S. at 571–72 (“[T]he right of free speech is not absolute. . . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”).
  10. *Ottinger v. Non-Party The Journal News*, No. 08-03892, 2008 N.Y. Misc. LEXIS 4579, at \*1 (Sup. Ct. Westchester County June 27, 2008).
  11. *Id.* at \*1–2.
  12. *Id.* at \*3. A different New York court dealt with similar facts but found that the statements at issue did not constitute libel as a matter of law. See *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695, 699 (Sup. Ct. 2007). As a result, that court never reached an occasion to explicitly adopt a test for unmasking anonymous posters accused of defamation. See *id.* But see discussion of *In re Application of Cohen*, 887 N.Y.S.2d 424, 427 (Sup. Ct. N.Y. County 2009) *infra* note 60.
  13. See *Ottinger*, 2008 N.Y. Misc. LEXIS 4579 at \*4–5.
  14. *Id.* at \*5. The elements of libel in New York are: “(1) a false and defamatory statement of fact; (2) regarding the plaintiff; (3) which is published to a third party; and which (4) results in injury to plaintiff.” *Penn Warranty Corp. v. DiGiovanni*, 810 N.Y.S.2d 807, 813 (Sup. Ct. N.Y. County 2005).
  15. *Ottinger*, 2008 N.Y. Misc. LEXIS 4579 at \*5 (quoting *Dendrite*, 775 A.2d at 760) (emphasis omitted).
  16. For an in-depth comparison of recent standards created by courts to determine whether to unmask an anonymous poster accused of defamation, see *Martin*, *supra* note 5, at 1227–33 (discussing the “good-faith” standard, “opinion-centered” standard, *Dendrite* standard, and *Cabill* “summary judgment” standard).
  17. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).
  18. *Ottinger*, 2008 N.Y. Misc. LEXIS 4579 at \*7.

or intimidate their anonymous critics into silence.<sup>19</sup> This case comment contends that by not requiring public figure libel plaintiffs to show actual malice to unmask anonymous online critics, the *Ottinger* test contravenes established First Amendment precedent and, as applied, will chill anonymous free speech online.<sup>20</sup>

Richard Ottinger is a former U.S. Congressman and founding staff member of the Peace Corps.<sup>21</sup> From 1964 to 1985, he represented each of New York’s 20th, 24th, and 25th congressional districts for various terms,<sup>22</sup> with the exception of a break in the early 1970s when he made an unsuccessful bid for the U.S. Senate.<sup>23</sup> From 1981 to 1985, Mr. Ottinger served as chairman of the Energy Conservation and Power Subcommittee,<sup>24</sup> and was known as one of the earliest environmentalists in Congress.<sup>25</sup> He retired from the House of Representatives in 1985 and went on to serve as a law professor and dean of Pace University Law School.<sup>26</sup> He retired from Pace in 1999 and currently serves as Dean Emeritus.<sup>27</sup>

In 2007, Mr. Ottinger and his wife, June, (collectively “the Ottingers”) were renovating their home in Mamaroneck, New York.<sup>28</sup> The Ottingers sought the

19. *Cabill*, 884 A.2d at 457.

A defamation plaintiff, particularly a public figure, obtains a very important form of relief by unmasking the identity of his anonymous critics. The revelation of identity of an anonymous speaker ‘may subject [that speaker] to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwanted exposure to her mental processes.’ . . . After obtaining the identity of an anonymous critic through the compulsory discovery process, a defamation plaintiff who either loses on the merits or fails to pursue a lawsuit is still free to engage in extra-judicial self-help remedies; more bluntly, the plaintiff can simply seek revenge or retribution.

*Id.* (quoting Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 890 (2000)). These lawsuits are often referred to as Strategic Lawsuits Against Public Participation (“SLAPP”), although SLAPP suits are just “one subset of intimidation litigation.” Lidsky, *supra*, at 860 n.11. To counteract the influence of SLAPP litigation, 25 states have enacted anti-SLAPP statutes, which typically require a judge to make a threshold determination of the plaintiff’s probability of winning before allowing the action to proceed. *See* First Amendment Project, The Anti-SLAPP Resource Center, <http://www.thefirstamendment.org/antislappresourcecenter.html> (last visited Dec. 28, 2009).

20. *See* Lidsky, *supra* note 19, at 887–92 (“[T]he chilling effect occurs when defamation law encourages prospective speakers to engage in undue self-censorship to avoid the negative consequences of speaking.”).

21. Curriculum Vitae, Richard L. Ottinger, *available at* <http://www.law.pace.edu/files/facultyCVs/dottingercv2007.pdf>.

22. *See id.*

23. *Id.*

24. *Id.*

25. *See id.*

26. *See id.*

27. *Id.*

28. Complaint at 1, *Ottinger v. John Doe* 1-100, No 3892/08 (N.Y. Sup. Ct. Feb. 25, 2008), *available at* <http://www.citmedialaw.org/sites/citmedialaw.org/files/2008-02-25-Ottingers%20Original%20Summons%20and%20Complaint.pdf> [hereinafter *Ottinger Complaint*].

necessary permits and approvals from various local agencies, including the Zoning Board of Appeals.<sup>29</sup> Before receiving approval from the Zoning Board of Appeals, the Ottingers were required to resolve issues that arose because several of their neighbors were upset with the planned size of the Ottingers' house.<sup>30</sup>

The Ottingers ultimately received a building permit and began construction.<sup>31</sup> In September 2007, the Ottingers' building permit became a topic of discussion on the LoHud.com blog,<sup>32</sup> hosted by the *Journal News*, a newspaper serving Westchester, Rockland, and Putnam counties.<sup>33</sup> Several anonymous statements appeared on LoHud.com accusing the Ottingers of bribery, fraud, and deceit in connection with their receipt of the various permits and approvals necessary to renovate their home.<sup>34</sup> The postings, excerpted below as they appeared in the Ottingers' complaint, came from three screen names: "SAVE10543," "hadenough," and "aoxomoxoa."<sup>35</sup> On September 11, 2007, SAVE10543 posted:

It now appears that it has been proven, that the Ottinger's . . . have presented a FRAUDULENT deed in order to claim that they own land under water. . . . We are talking about the Ottingers LYING to the State, the Building Department, the ZBA and necessarily either bribing or coercing other people to do the same.<sup>36</sup>

On September 15, 2007, hadenough posted:

Equally outrageous, was that as Ms. McCrory was informing the dumbstruck BOT of the Ottingers criminal behavior . . . and advocated for the Ottinger's position in order to further their illegal scam.<sup>37</sup>

On September 19, 2007, aoxomoxoa posted:

He [the mayor of Mamaroneck] took the juice from Richard and June Ottinger to the tune of \$25,000 so they could build their starter Taj Mahal on a substandard lot. Their money bought a compliant ZBA and Building Inspector. . . .<sup>38</sup>

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29. *Id.*

30. *Id.*; see also Candice Ferrette, *State Stakes Claim as Battle Over Ottingers' Mamaroneck House Continues*, THE JOURNAL NEWS, Oct. 3, 2007, at 1A.

31. Ottinger Complaint, *supra* note 28, at 2.

32. *Id.* LoHud.com is devoted to news, commentary, and user-generated comments pertaining to current events in New York's Lower Hudson Valley. See <http://www.lohud.com> (last visited Jan. 8, 2010).

33. See LoHud, About Us: Mission and History, <http://www.lohud.com/article/99999999/MEDIAKIT08/90225031> (last visited Jan. 8, 2010).

34. *Ottinger*, 2008 N.Y. Misc. LEXIS 4579, at \*1-2.

35. *Id.*

36. *Id.* at \*1.

37. *Id.* at \*1-2.

38. *Id.* at \*2.

On September 23, 2007, SAVE10543 posted:

THEY PAID THE RIGHT PEOPLE OFF! They started with taking care of the Mayor, everybody knows that. I would guess the Building inspector and Zoning Board were not forgotten in their largesse. The Ottingers have been very generous in greasing the wheels of corruption. With the news of the fraudulent deed they submitted it becomes quite clear that they also must have taken care of the surveyor and the prior owner of the property, unless they are two of the dumbest people on earth!<sup>39</sup>

In their complaint, filed on February 5, 2008, the Ottingers alleged that the preceding statements constituted libel per se<sup>40</sup> and “had the tendency to expose the [Ottingers] to public hatred, contempt, ridicule or disgrace.”<sup>41</sup> The complaint named as defendants John Doe 1–100 and Jane Doe 1–100.<sup>42</sup> The Ottingers alleged that the anonymous persons making these statements knew them to be false “or acted in reckless disregard of [their] truth or falsity.”<sup>43</sup> Further, the Ottingers alleged that the statements caused them to suffer damage to their “reputation and standing in the community.”<sup>44</sup> The Ottingers demanded a judgment in the amount of \$500,000 for their claim of libel per se and \$1 million in punitive damages.<sup>45</sup> They also demanded that a public apology be posted on the LoHud.com blog.<sup>46</sup>

To ascertain the identities of the defendants, the Ottingers served a subpoena on the *Journal News* on February 28, 2008.<sup>47</sup> On March 21, 2008, the *Journal News* moved to quash the subpoena pursuant to CPLR section 2304.<sup>48</sup> On April 11, 2008, the Ottingers cross-moved to compel pursuant to CPLR section 3124 or, in the alternative, to convert the action to a special proceeding under CPLR section 103(c) and allow pre-action disclosure under CPLR section 3102(c).<sup>49</sup>

On May 28, 2008, the court held a hearing regarding the motions and ordered that the hearing be converted to a special proceeding to allow the Ottingers to seek

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39. *Id.*

40. *See* Ottinger Complaint, *supra* note 28, at 3. Under New York law, some written statements are considered libel per se if they “(1) charge plaintiff with a serious crime; (2) tend to injure plaintiff in its business, trade or profession; (3) [communicate that] plaintiff has some loathsome disease; or (4) impute unchastity. *Penn Warranty Corp.*, 810 N.Y.S.2d at 813. Such statements are presumed to cause injury, so a separate showing of harm is not necessary. *Id.*

41. Ottinger Complaint, *supra* note 28, at 3.

42. *Id.*

43. *Id.*

44. *Id.* at 3–4.

45. *See id.*

46. *Id.*

47. *Ottinger*, 2008 N.Y. Misc. LEXIS 4579, at \*2.

48. *Id.*

49. *Id.* at \*2–3.

pre-action disclosure pursuant to CPLR section 3102(c).<sup>50</sup> However, before ruling on the motions, Judge Bellantoni directed the Ottingers to post notice of their impending lawsuit on the LoHud.com blog in order to afford the anonymous posters an opportunity to respond.<sup>51</sup> No one appeared at the courthouse on June 25, 2008 at 10 a.m. to represent the anonymous posters.<sup>52</sup> On June 27, 2008, the court denied the *Journal News's* motion and granted the Ottingers' cross-motion.<sup>53</sup> The court ordered the *Journal News* to "disclose to petitioners such information, if any, in its possession or control that could reasonably lead to the identification of the Anonymous Posters using the screen names 'hadenough,' 'SAVE10543,' and 'aoxomoxoa.'"<sup>54</sup>

The *Ottinger* court relied heavily on *Dendrite International, Inc. v. Doe*, a New Jersey case. In *Dendrite*, the court considered whether to compel a web host to identify fourteen John Doe defendants whom a pharmaceutical company alleged had posted trade secrets and defamatory comments on several Yahoo! message boards.<sup>55</sup> The company alleged that posts by one of the fictitiously named individuals were correlated with decreases in the company's stock price.<sup>56</sup> In affirming the decision of the lower court, which denied the company's request to unmask John Doe No. 3,<sup>57</sup> the *Dendrite* court laid out a four-part test for determining whether to compel a web host to reveal the identity of an anonymous poster accused of online defamation: the plaintiff must (1) "notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure" and give them a reasonable opportunity to respond; (2) "identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech;" and (3) "produce sufficient evidence supporting each element of [the plaintiff's] cause of action, on a prima facie basis;" and (4) "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."<sup>58</sup>

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50. *Id.* at \*3.

51. *Id.* at \*5–6.

52. *See id.* at \*6.

53. *Id.* at \*7.

54. *Id.* The order required the *Journal News* to produce the names, mailing addresses, email addresses or other registration that it may have collected from the anonymous posters, including the IP address from which the blogs were posted, the corresponding internet service provider, and any other information that would allow the Ottingers to identify the authors of the posts. *Id.* at \*7–8.

55. *Dendrite*, 775 A.2d at 760. The company alleged that the defamatory comments at issue stated that a recent change in the company's revenue reporting methods was designed to make the company appear more profitable than it was. *Id.* at 763. One of the postings at issue read: "[Dendrite president John Bailye] has his established contracts structured to provide a nice escalation in revenue. And then he's been changing his revenue accounting to further boost his earnings . . ." *Id.*

56. *Id.* at 769.

57. *Id.* at 760.

58. *Id.* at 760–61.

The *Ottinger* court adopted the *Dendrite* test in full.<sup>59</sup> However, since *Dendrite* involved a corporate plaintiff, the *Dendrite* court did not address whether its third prong, which requires a prima facie showing of each element of libel, also includes the extra element of “actual malice” that is a required showing for public figure libel plaintiffs.

A claim of defamation involves injury to a person’s reputation, either by oral expression (slander), or by written expression (libel).<sup>60</sup> In New York, a libel plaintiff must prove “[1] a false and defamatory statement of fact; [2] regarding the plaintiff; [3] which [is] published to a third party and which [4] result[s] in injury to [the] plaintiff.”<sup>61</sup> But since the landmark decision in *New York Times Co. v. Sullivan*, the Supreme Court has also required that state libel laws differentiate between public figure plaintiffs and private citizen plaintiffs.<sup>62</sup> Recognizing that the value of open discussion about the “character and qualifications” of public officials outweighs the potential for injury to the reputations of individuals,<sup>63</sup> the Supreme Court required public figure plaintiffs to prove the additional element of actual malice in order to prevail on a libel claim.<sup>64</sup> A statement evidences actual malice when it is made “with knowledge that it was false or with reckless disregard of whether it was false or

59. *Ottinger*, 2008 N.Y. Misc. LEXIS 4579 at \*4–5.

60. *Penn Warranty Corp.*, 810 N.Y.S.2d at 813. Recently, another New York court ordered Google to turn over the e-mail address of an anonymous user of its popular blogging website, Blogger.com. *See Cohen*, 887 N.Y.S.2d at 427. In *Cohen*, an anonymous individual was accused by the plaintiff of defamation for creating a blog called “Skanks of NYC,” which featured photographs of the plaintiff and a myriad of innuendo clearly intended to portray the plaintiff as sexually promiscuous and unhygienic. *Id.* at 425–26. The plaintiff, a fashion model, sued Google to discover the identity of the anonymous user. *Id.* at 426. The court ruled that the plaintiff had satisfied the elements of a defamation claim on a prima facie basis, and thus Google could be compelled to turn over the identifying information of the anonymous poster. *Id.* at 427. Interestingly, the *Cohen* court explicitly declined to adopt the *Dendrite* test. *Id.* at 427 n.5. Moreover, the *Cohen* court did not address the issue of whether the plaintiff, a professional full-time model, could be considered a “public figure,” and *Cohen* did not cite *Ottinger*. These aspects of the *Cohen* decision appear to reflect the largely unsettled nature of the law in New York regarding the appropriate standard that a judge should apply before forcing the web host to reveal the identity of an anonymous poster accused of defamation.

61. *Penn Warranty Corp.*, 810 N.Y.S.2d at 813; *see also* *Sandler v. Simoes*, 609 F. Supp. 2d 293, 300 (E.D.N.Y. 2009).

62. 376 U.S. 254, 279–80 (1964).

63. *Id.* at 281. The Supreme Court reasoned:

“(I)t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great and the chance of injury to private character so small that such discussion must be privileged.”

*Id.* (quoting *Coleman v. MacLennan*, 98 P. 281, 286 (Kan. 1908)).

64. *Id.* at 283.

not.<sup>65</sup> This is a state of mind determination that can rarely be made without the defendant's identity.<sup>66</sup> Therefore, evaluating the state of mind of an anonymous defendant poses an obvious obstacle.

One rationale for placing the added burden of actual malice on public figure libel plaintiffs is to block public figures from using their special access to resources or greater influence in the community to silence their critics and discourage public participation in matters of public concern.<sup>67</sup> The Supreme Court has also explained that public figures should enjoy less protection from libel because generally they have greater opportunities to rebut inaccurate information about them than do private citizens,<sup>68</sup> and generally have entered public life voluntarily; they therefore have assumed the risk of injury from defamation that comes with being subjected to greater public scrutiny.<sup>69</sup> A "public figure" is someone who has attained "general fame and notoriety in the community, and pervasive involvement in the affairs of society."<sup>70</sup> Public officials, such as elected officials or government employees charged with performing tasks for the benefit of the public, are broadly considered to be public figures, even after they leave office.<sup>71</sup>

The *Ottinger* court implicitly acknowledged that the *Dendrite* test could not fully control the case at hand because *Dendrite* never considered whether it was possible for a public figure defamation plaintiff to establish prima facie evidence of actual malice without the defendant's identity.<sup>72</sup> Therefore, the *Ottinger* court turned to *Doe v. Cabill*,<sup>73</sup> in which the Supreme Court of Delaware considered whether a city councilman could compel the host of an online message board to disclose the identity of an anonymous poster whom he had accused of libel.<sup>74</sup> In ruling that the plaintiff

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65. *Id.* at 279–80.

66. See Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards*, 83 OR. L. REV. 795, 840 (2004) ("In cases where 'actual malice' is an element to be proved by the plaintiff, the defendant's identity may be highly relevant to motive and, thus, to whether malice is established.")

67. See Lidsky, *supra* note 19, at 865.

68. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 362–63 (1974).

69. *Id.* at 345, 363.

70. *Id.* at 352. But see Stuart Taylor Jr., *By Law, 'Public Figure' May Not Be So Obvious*, N.Y. TIMES, Feb. 26, 1988, at B9. A federal judge in Georgia, Alexander A. Lawrence, has compared the task of defining who is a public figure to "trying to nail a jellyfish to the wall." *Id.*

71. Citizen Media Law Project, *Proving Fault: Actual Malice and Negligence*, <http://www.citmedialaw.org/legal-guide/proving-fault-actual-malice-and-negligence> (last visited Dec. 29, 2009).

72. See *Ottinger*, 2008 N.Y. Misc. LEXIS 4579 at \*5–7.

73. *Id.* at \*6.

74. *Cabill*, 884 A.2d at 454. In *Cabill*, the anonymous statements at issue, which were posted on the website of the Delaware State News, claimed that Councilman Cahill suffered from an "obvious mental deterioration" and was "paranoid." *Id.*

could not force the web host to disclose the identity of the anonymous poster,<sup>75</sup> *Cabill* also adopted most of the test outlined in *Dendrite*.<sup>76</sup> However, in addressing the actual malice element required of public figures, the court noted simply that “it may be difficult, if not impossible” for the plaintiff to present a prima facie case of actual malice without the identity of the defendant.<sup>77</sup> Therefore, the court held that a public figure libel plaintiff did not need to produce evidence of actual malice, but only needed to provide prima facie evidence of the same elements of libel required of a private libel plaintiff.<sup>78</sup>

By following *Dendrite* and *Cabill*, which both refused to unmask John Doe defendants, the *Ottinger* court should have quashed the Ottingers’ subpoena, instead of forcing the *Journal News* to unmask the anonymous posters accused of defaming the former Congressman and his wife. The test established by *Ottinger* is problematic because it fails to incorporate any distinction between public figure libel plaintiffs and private libel plaintiffs. The resulting precedent creates an end-run around the Supreme Court’s “actual malice” requirement, and allows public figure libel plaintiffs to unmask anonymous critics with little regard for the strength of their underlying libel claims.<sup>79</sup> As a result, the *Ottinger* court handed over the identity of anonymous posters without considering that a John Doe’s identity alone is all a public figure libel plaintiff needs to launch a campaign of intimidation or harassment to silence what might otherwise be lawful criticism. This result plainly contradicts the spirit of Supreme Court precedent that affords greater weight to anonymous free speech than to a public figure’s right to recover for defamation.<sup>80</sup>

In *Ottinger*, the parties did not dispute that Mr. Ottinger, as a former Congressman and law school dean, was a public figure who would be subject to establishing actual malice before prevailing on his libel claim.<sup>81</sup> Nor did the parties dispute that the anonymous blog posts at issue identified the plaintiffs, were effectively published by their posting on the Internet, and were of a nature that charged the plaintiffs with a crime (thus falling under the category of libel per se and removing the necessity that plaintiffs prove injury). Rather, the disputed issue centered on whether it was

75. *See id.* at 454; *see also* Rita K. Farrell, *Delaware Supreme Court Declines to Unmask a Blogger*, N.Y. TIMES, Oct. 6, 2005, at C3.

76. *Cabill*, 884 A.2d at 460–61. However, the *Cabill* court did away with the second and fourth prongs of the *Dendrite* test, reasoning that both were redundant. *See id.* at 461. Under prong two, the plaintiff’s complaint would necessarily contain an explicit outline of the statements alleged to be actionable. *Id.* Under prong four, the court reasoned that the summary judgment standard is itself the balance, so no further balancing of the defendant’s First Amendment right against the strength of the plaintiff’s prima facie case is necessary. *Id.*

77. *Id.* at 464; *see also* *New York Times*, 376 U.S. at 287 (explaining that the determination of actual malice requires an inquiry into the defendant’s state of mind).

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

79. *See* Lidsky, *supra* note 19, at 889.

80. *See* *New York Times*, 376 U.S. at 302–05.

81. Curiously, however, the court never mentions the fact that Mr. Ottinger was a former congressman. *See Ottinger*, 2008 N.Y. Misc. LEXIS 4579.

appropriate to require a public figure libel plaintiff to make a prima facie showing of actual malice at such an early stage in the litigation. The *Ottinger* court ruled incorrectly on this issue, finding that the actual malice standard should not be added to the *Dendrite* test.

For public figure libel plaintiffs seeking only to harass and intimidate their anonymous critics, unmasking their critics' identities may be the only judicial remedy they really care about.<sup>82</sup> "Whether their defamation claim is actually valid makes no difference to these plaintiffs, for the lawsuit is only 'one tool in a concerted public relations campaign' to silence critics."<sup>83</sup> Recognizing that public officers should receive less protection from libel than private citizens, the actual malice standard is an important shield for anonymous posters facing intimidation suits by public figures.<sup>84</sup> Although both the *Cabill* and *Ottinger* courts are likely correct that requiring a public figure libel plaintiff to produce evidence of actual malice without the defendant's identity may be difficult,<sup>85</sup> "this result does not mean that the element should be wholly thrown out of the analysis."<sup>86</sup>

As some commentators have argued, it may be possible to "develop a standard that maintains the spirit of the First Amendment actual malice requirement without specifically forcing plaintiffs to prove actual malice before discovery."<sup>87</sup> Such a standard could require public figure libel plaintiffs to meet the *Dendrite* standard, "and show that the defamatory language at issue was of such an egregious nature that the plaintiff will likely be able to produce evidence of actual malice at trial."<sup>88</sup> The logic here is that some defamatory statements might be so outlandish that a court could infer from their content that whomever was responsible for making the statements must have done so with reckless disregard for whether the statements were true or false.<sup>89</sup> Indeed, some courts have recognized that the specific content of online speech alleged to be defamatory can be probative of whether an anonymous defendant acted with actual malice.<sup>90</sup>

The "egregious nature" standard would avoid the problems with ascertaining the state of mind of an anonymous individual, and would be closer to an appropriate balance of anonymous posters' rights to free speech with public figures' rights to seek

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82. See Lidsky, *supra* note 19, at 876–77.

83. Martin, *supra* note 5, at 1238–39 (quoting Lidsky, *supra* note 19, at 876–77).

84. See *id.* at 1243.

85. *Id.*; see also Vogel, *supra* note 66.

86. Martin, *supra* note 5, at 1243.

87. *Id.*

88. *Id.*

89. See *id.*

90. See Jessica L. Chilson, Note, *Unmasking John Doe: Setting a Standard for Discovery in Anonymous Internet Defamation Cases*, 95 VA. L. REV. 389, 408 (2009); see also *In re Richard L. Baxter*, No. 01-00026-M, 2001 U.S. Dist. LEXIS 26001, at \*52 (W.D. La. Dec. 19, 2001) (explaining that particular statements of hyperbole can evidence an "underlying animus" from which a defendant's actual malice can be inferred).

redress for damages suffered from libel.<sup>91</sup> While courts may struggle to define what constitutes “egregious” content that suggests a plaintiff’s likelihood of proving actual malice at trial, the policy rationales for holding public figure libel plaintiffs to a higher standard require a more nuanced analysis than is accomplished by simply ignoring actual malice during pre-trial discovery.<sup>92</sup>

When dealing with libel claims brought by public figures against anonymous Internet posters, it may also be true that courts will rarely reach the actual malice analysis because a libel claim can only go forward if the material alleged to be defamatory is a “statement of fact.”<sup>93</sup> Given a growing line of cases, including *Cabill*, which have found that reasonable readers do not presume postings on blogs and message boards to be factual,<sup>94</sup> it is hard to imagine how the allegedly defamatory statements at issue in *Ottinger* could withstand a motion for summary judgment on the statement of fact element. It is even harder to imagine the same statements meeting the “egregious nature” standard proposed *supra* as a substitute for direct evidence of actual malice. Counsel for the *Journal News* pointed out that the statements relied upon by the plaintiffs for their claim of libel were taken out of context, and that “the courts are obliged to consider the communication as a whole, as well as its immediate and broader social contexts, to determine whether a reasonable

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91. Martin appears to argue that the “egregious nature” test should be applied when the content of the speech at issue is political (as opposed to non-political). See Martin, *supra* note 5, at 1243. However, I would argue that this approach is under-inclusive because it ignores that some compelling rationales for protecting anonymous speech are based on a public figure’s increased ability to intimidate critics into silence, regardless of the political or non-political nature of the speech at issue. See Lidsky, *supra* note 19, at 865. As formulated by Martin, the quoted standard would not protect the poster in *Ottinger* because although Mr. Ottinger’s status as a public figure has not been challenged, the content of the anonymous postings concerned his personal dealings, not his political work. See *supra* discussion and text accompanying notes 21–34, 81. Therefore, the application should turn on the identity of the plaintiff, so that public figure libel plaintiffs are restrained from unmasking anonymous defendants regardless of the content of the speech at issue. This view is more in line with the Supreme Court’s broad recognition that the First Amendment protects the right to speak anonymously. See *McIntyre*, 514 U.S. at 342 (“The interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.”).

92. See Martin, *supra* note 5, at 1243.

93. See *Penn Warranty Corp.*, 810 N.Y.S.2d at 813.

94. See *Cabill*, 884 A.2d at 465 (citing *Rocker Mgmt., LLC v. Does 1 through 20*, No. MISC 03-003 3 CRB, 2003 U.S. Dist. Lexis 16277, at \*5 (N.D. Cal. May 28, 2003) (noting that online messages at issue were “replete with grammar and spelling errors; most posters [did] not even use capital letters. Many of the messages [were] vulgar and offensive, and [were] filled with hyperbole. . . . In this context, readers are unlikely to view messages posted anonymously as assertions of fact.”); *Global Telemedia Int’l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001); *SPX Corp v. Doe*, 253 F. Supp. 2d 974, 981 (N.D. Ohio 2003); see also *Penn Warranty Corp.*, 810 N.Y.S.2d at 814:

It is the court’s responsibility in the first instance to determine whether a publication is susceptible to the defamatory meaning ascribed to it. A court should neither strain to place a particular construction on the language complained of nor strain to interpret the words in their mildest and most inoffensive sense to hold them nonlibelous.

*Id.* (internal citations omitted). But see discussion of *Cohen*, *supra* note 60.

listener or reader is likely to understand the remark as an assertion of provable fact.”<sup>95</sup> The *Cabill* decision quashed the plaintiff’s subpoena on the grounds that the statements alleged to be libel were in a context so unreliable that they could not be read as factual, and thus, not defamatory.<sup>96</sup> Further, the *Cabill* decision specifically noted that “[b]logs and chat rooms tend to be vehicles for the expression of opinions; by their very nature, they are not a source of facts or data upon which a reasonable person would rely.”<sup>97</sup> The statements at issue in *Ottinger*<sup>98</sup>—in their entirety and grouped with the non-offending statements on the LoHud.com blog—display many hallmarks of unreliability that *Cabill* and other courts have identified in order to question whether reasonable readers would believe what they read on a particular message board to be factual.<sup>99</sup> These posts are rife with hyperbole, grammatical errors, and irregular use of capitalization to connote emphasis and sarcasm.<sup>100</sup>

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95. Reply Memorandum of Law of Nonparty Witness The Journal News in Support of Its Motion to Quash at 5, *Ottinger v. Doe* 1-100, No. 08/3892 (N.Y. Sup. Ct. Apr. 23, 2008) (quoting *Brian v. Richardson*, 87 N.Y.2d 46, 51–52 (1995)).

96. *Cabill*, 884 A.2d at 467.

97. *Id.* at 465. The court also noted, “in terms of reliability, there is a spectrum of sources on the internet. For example, chat rooms and blogs are generally not as reliable as the *Wall Street Journal Online*.” *Id.*

98. See *Ottinger* Complaint, *supra* note 28. For example, a significantly longer excerpt of the entire posting from anonymous user “SAVE10543,” in a thread entitled, “The Sounds of Silence,” provides much more context than the excerpt in the *Ottingers*’s complaint. The longer excerpt reads as follows:

At last night’s BOT [Board of Trustees] meeting, Susan McCrory came to the podium in the public comment session with an update on Richard and June Ottingers’s McMansion project. She said that she had received a letter from The State of New York informing her that the Ottinger’s [sic] property was 20% smaller than the Ottingers had been claiming. I have to assume that Ms. McCrory’s information was correct since she seems to always choose her words very carefully. It now appears that is has been proven, that the Ottinger’s [sic], through incredible effort and machinations, have presented a FRAUDULENT deed in order to claim that they own land under water. I was blown away by this news, but what came next was even more amazing, DEAD SILENCE. The entire Board of Trustees just sat there, not a word, DEAD SILENCE.

*Id.* at Exhibit A 1–2.

99. See *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969, 973 (N.D. Cal. 2004) (refusing to unmask an anonymous poster because context of statements at issue suggested they were not assertions of fact). In describing the context of the statements it found were not defamatory, the *Highfields* court noted:

The content, character, and quality of these messages covers a huge range. Many of the messages are crude, indecent, or transparently laughable—and many appear to have nothing whatsoever to do with [the plaintiff]. Many of the postings include misspellings, grammatical errors, and/or incomplete thoughts and sentences. Many of the posters use screen names that would suggest, if taken seriously, some connection with [the plaintiff]. . . . Messages on this board reflect considerable venting, much tongue-in-cheek, little pretense at sophistication or thoughtfulness, and an ample and obvious sense of irreverence.

*Id.* (footnote omitted).

100. Compare *id.* at 975, with *Ottinger* Complaint, *supra* note 28, at Exhibit A 1–8.

Moreover, several of the statements at issue, in their unabridged form, contain descriptions of personal observations from which the anonymous posters appear to draw their conclusions.<sup>101</sup> Courts have long held that these types of statements are presumptively non-defamatory because a reader can judge the quality of the poster's analysis himself, and is thus more likely to recognize that the poster's comments are subjective opinions, rather than objective statements of fact.<sup>102</sup>

Although the *Ottinger* court made a strong move toward adequately protecting anonymous online speech by adopting the standard from *Dendrite*, it took a step backward by adding the caveat from *Cabill* that a public figure libel plaintiff does not have to show any evidence of actual malice. Furthermore, the *Ottinger* court's application of the *Dendrite* test failed to discuss the unreliable context of the LoHud.com postings in its determination of whether the postings at issue were capable of conveying defamatory meaning.<sup>103</sup> The *Ottinger* court allowed public figures to bypass the significantly higher burden of proof normally required of public figure libel plaintiffs both by adopting a weaker than necessary standard, and then by failing to properly apply it.<sup>104</sup> Therefore, it allowed easier access to the identities of anonymous posters, which is a powerful remedy in itself for libel plaintiffs whose only interest may be in pursuing an extra-judicial remedy of intimidation.<sup>105</sup> Indeed,

101. See *supra* note 98.

102. See *Penn Warranty Corp.*, 810 N.Y.S.2d at 815.

[T]he following factors should be considered in distinguishing fact from opinion: (1) whether the language used has a precise meaning or whether it is indefinite or ambiguous, (2) whether the statement is capable of objectively being true or false, and (3) the full context of the entire communication or the broader social context surrounding the communication. Moreover, the Court of Appeals makes a distinction between a statement of opinion that implies a factual basis that is not disclosed to the reader and an opinion that is accompanied by a recitation of facts on which it is based. The former is actionable, the latter is not.

*Id.* (citations omitted).

103. See *Ottinger*, 2008 N.Y. Misc. LEXIS 4579; see also *Highfields*, 385 F. Supp. 2d at 979 (discussing how negative statements made about a company on an Internet message board could not possibly be considered factual assertions because of their unreliable context).

The final piece of the context puzzle is the character of the message board itself. There is so much obvious garbage in the messages that appear in this venue,' [sic] and there are so many impersonations' [sic] that are so obviously and intentionally bogus on this and similar message boards, that it is highly unlikely that a reader of a message in this setting would approach it with anything but skepticism—as to both content and source. There is so much irreverence and jocularly in this venue, so much mockery, so much venting, so much indecency and play, that no even remotely rational investor would take messages posted here at face value or base investment decisions on them. Similarly, no one who looks at a message board like this for more than five minutes is likely to assume that the author identifications are reliable.

*Id.* at 978–79 (footnote omitted).

104. See *New York Times*, 376 U.S. at 279–80.

105. See *Lidsky*, *supra* note 19; see also *Doe v. 2themart.com Inc.*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001).

the Ottingers' libel claim was eventually thrown out because it could not meet the higher burden of proof normally demanded of public figure libel plaintiffs—but not before the Ottingers were able to find out their neighbor was behind the original posts.<sup>106</sup> As more libel cases are filed against anonymous posters, future application of the *Ottinger* test may convince John Doe that it is safer to log off the Internet than to mouth off about public figures—a result that contravenes the First Amendment and chills the anonymous speaker's right to free speech.

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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.

*Id.*

106. See Wendy Davis, *After Unmasking, Judge Throws Out Libel Case Against Anonymous Blogger*, ONLINE MEDIA DAILY (Sept. 11, 2009), [http://www.mediapost.com/publications/?fa=Articles.showArticle&cart\\_aid=113406](http://www.mediapost.com/publications/?fa=Articles.showArticle&cart_aid=113406) (stating *Ottinger* case was dismissed pursuant to New York's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute, which prevents plaintiffs from recovering damages for libel "when the allegedly defamatory statements involve matters of public interest unless the speakers have 'actual malice.'"). For a discussion of SLAPP suits, see *supra* note 19.