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I. INTRODUCTION

Scholars hail the Internet as humanity's nearest realization of Justice Oliver Wendell Holmes's utopian "marketplace of ideas."[1] It provides anyone with a computer and an Internet connection the opportunity to publish her opinion to wide audiences on the political and social issues of the day.[2] Yet this unprecedented opportunity is often squandered; more often than not, Internet publishers focus their energies on inane, trivial, narcissistic, and, at times, downright offensive commentary.[3] Such speech, coupled with the ease of wide distribution, holds the potential to exact harm on innocent people and businesses, no matter their level of popularity among the public.[4]

In the United States, freedom of speech is valued as one of the most basic and important rights of a free and democratic society.[5] However, this right is limited in

1. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see* Fred H. Cate, *Law in Cyberspace*, 39 How. L.J. 565, 578 (1996) ("The 'marketplace' metaphor, however worthy, has had little meaning in the physical world, where the ability to reach large audiences is controlled by a handful of major media corporations. On the Internet, however, anyone . . . has the same access to the same on-line audience as the largest broadcaster and newspaper."); Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. Miami L. Rev. 137, 137 (2008) ("Over the course of the past two decades, 'speakers and publishers from all walks of life and from every corner of the world' have 'flocked to the internet,' resulting in 'the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen.'" (quoting both ACLU v. Reno, 929 F. Supp. 824, 881 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997), and Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 Berkeley Tech. L.J. 1115, 1119 (2005))); Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 Comm. L. & Pol'y 405, 407 (2003) ("The Internet has emerged as a true marketplace of ideas . . . ."); Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 893 (2000) ("Scholars have touted the Internet as the living embodiment of the 'marketplace of ideas' metaphor that lies at the heart of First Amendment theory.").

2. *See* Cate, *supra* note 1, at 578 ("On the Internet, however, anyone armed with a computer and a modem can become an author, artist, and creator, as well as a reader and viewer."); *see also* Lidsky, *supra* note 1, at 894–95 ("The Internet gives citizens inexpensive access to a medium of mass communication and therefore transforms every citizen into a potential 'publisher' of information for First Amendment purposes.").

3. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (quoting 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 571 (Jonathan Elliot ed., 2d ed. 1876)) ("As Madison said, 'some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.'"); *see also* Lidsky, *supra* note 1, at 893 ("Discourse on the [Internet] boards bears more resemblance to informal gossip than to rational deliberation, and the culture of the boards fosters, as one commentator put it, 'disinformation, rumors and garbage.'"); *see also, e.g.*, John Intini, *Look at us. Suddenly we're all celebrities*, Macleans, July 14, 2006, *available at* http://www.macleans.ca/article.jsp?content=20060724_130546_130546 ("An effect of all this is the elevation of the completely ordinary. The clearest model may be YouTube, the video-sharing website with the narcissistic 'Broadcast Yourself' tag line, which is getting 70 million video views a day.").

4. Lidsky, *supra* note 1, at 903 ("Some are simply responding in the only way available to prevent aggressively uncivil [Internet] speech, the sole purpose of which is to cause emotional and financial harm.").

5. Rodney Smolla, *Speech Overview*, First Amendment Center, http://www.firstamendmentcenter.org/Speech/overview.aspx (last visited Sept. 14, 2010) ("'[F]reedom of speech' is a value that has become powerfully internalized by the American polity. Freedom of speech is a core American belief, almost a kind of secular religious tenet, an article of constitutional faith.").

certain instances, such as by the firmly established doctrine of defamation.[6] The Internet has created a new forum for defamatory commentary, producing an explosion of defamation claims.[7] A large amount of this commentary is published anonymously or pseudonymously, making defamation lawsuits against Internet speakers difficult from the start.[8] In many ways, this conflict between First Amendment rights and defamatory speech arises more frequently in the Internet context because of the freewheeling, anything-goes writing style that has developed within the fast growing "Internet culture," as well as the newly adopted values and expectations of Internet users.[9] Courts now face the difficult challenge of determining how to enforce

6. *E.g.*, Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) ("Libelous utterances [are] not . . . within the area of constitutionally protected speech . . . ."); Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 441 (2009) ("The anonymity of speech, however, is not absolute and may be limited by defamation considerations."); Ava v. NYP Holdings, Inc., 885 N.Y.S.2d 247, 251 (1st Dep't 2009) ("Defamation . . . can take one of two forms—slander or libel. Generally speaking, slander is defamatory matter addressed to the ear while libel is defamatory matter addressed to the eye."); *see* Ciolli, *supra* note 1, at 139–44 (discussing historical development of defamation law); *see also* Jonathan Garret Erwin, *Can Deterrence Play a Positive Role in Defamation Law?*, 19 Rev. Litig. 675, 680–92 (2000) (providing a history of defamation law).

7. *See* Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 Notre Dame L. Rev. 1537, 1575 (2007).

> Studies show that even when an Internet user is not anonymous and knows the recipient of his e-mail message, the speaker is more likely to be disinhibited when engaged in "computer mediated communication" than in other types of communications . . . . Since the Internet magnifies the number of anonymous speakers, it also magnifies the likelihood of false and abusive speech.

Id.; Ekstrand, *supra* note 1, at 416 ("America Online received approximately 475 civil subpoenas in 2000 from potential plaintiffs seeking identification of AOL users."); Edward L. Carter, *Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions*, 21 Santa Clara Computer & High Tech. L.J. 289, 298–99 (2005) (noting a one-third increase in criminal defamation claims relating to the rise of the Internet).

8. Lidsky & Cotter, *supra* note 7, at 1555–56 ("[T]he architecture of the Internet makes it easy to speak anonymously, or at least pseudonymously. As a result, there are more anonymous speakers than ever before using the freedom anonymity provides for both good and bad purposes." (footnote omitted)).

9. *See* Lee Tien, *Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 Or. L. Rev. 117, 153 (1996).

> Cyberspaces contain their own distinct communities, with norms that transcend not only local or national boundaries but any kind of physical boundary at all. In another sense, a given cyberspace . . . may represent a different set of norms about sexually graphic texts. This generates "the issue of whose community rules should govern a cyberspace controversy."

Id. (citations omitted); Glenn H. Reynolds, *Libel in the Blogosphere: Some Preliminary Thoughts*, 84 Wash. U. L. Rev. 1157, 1159–60 (2006) (discussing the peculiar nature of blog culture, specifically identifying general disapproval of libel suits among bloggers, a "low-trust culture" of posted information, and widespread self correction when a mistake is identified by another commentator); Lidsky, *supra* note 1, at 863 ("The fact that many internet speakers employ online pseudonyms tends to heighten this sense that 'anything goes,' and some commentators have likened cyberspace to a frontier society free from the conventions and constraints that limit discourse in the real world."); *see also Indep. Newspapers, Inc.* 966 A.2d. at 438 ("Since the early 1990's, when internet communications became available to the American public, anonymity or pseudonymity has been a part of the internet culture.").

defamation law in a manner that will not chill anonymous free speech on the Internet, a challenge that necessarily requires courts to become intimate with the quickly evolving mores of Internet culture.

In *Cohen v. Google, Inc.*,[10] the Supreme Court of New York, New York County, held that the plaintiff was entitled to an order for pre-action disclosure of an anonymous blogger's identity pursuant to New York Civil Practice Law and Rules section 3102(c)[11] after plaintiff demonstrated that her defamation claim satisfied the court's "meritorious cause of action" requirement.[12] In Part II, this case comment contends that the *Cohen* court erred in concluding that the blogger's statements were statements of fact rather than opinion, and thus erred in ordering the pre-action disclosure of an anonymous Internet speaker's identity. In Part III, this case comment contends that the "meritorious cause of action" test is an improper standard for unmasking anonymous Internet speakers under section 3102(c) and should be abandoned by New York courts in favor of the three-part test announced in *Mobilisa, Inc. v. Doe 1*.[13]

A. Background of Cohen v. Google, Inc.

Liskula Cohen was a thirty-six-year-old model living in New York City.[14] She led a successful modeling career and was described by the media as "a former Vogue cover girl."[15] On August 21, 2008, an anonymous blogger posted five messages about Ms. Cohen on www.blogger.com.[16] Blogger.com is a website owned by Google, Inc. that allows users to create and publish their own blogs.[17] The blogger posted these messages on a blog entitled "SKANKS IN NYC."[18] The postings included pictures of Ms. Cohen accompanied by captions describing her as: a "skank"; "skanky"; "psychotic, lying, whoring"; "our #1 skanky superstar"; and a "ho."[19] Some of the pictures depicted Ms. Cohen in a sexually suggestive manner,[20] and one caption suggested that Ms. Cohen was experienced in performing oral sex.[21]

10. 887 N.Y.S.2d 424 (Sup. Ct. N.Y. County 2009).

11. N.Y. C.P.L.R. 3102(c) (McKinney 2010) ("Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. The court may appoint a referee to take testimony.").

12. *Cohen*, 887 N.Y.S.2d at 429.

13. 170 P.3d 712, 721 (Ariz. Ct. App. 2007).

14. Dareh Gregorian, *Ex-Vogue Model Snared in Ugly Web*, N.Y. Post, Jan. 6, 2009, http://www.nypost.com/p/news/regional/ex_vogue_model_snared_in_ugly_web_aUTAquID0xeSF3RGKc6RcJ.

15. *Id.*

16. *Cohen*, 887 N.Y.S.2d at 425.

17. *Id.* For a definition of a blog, see *infra* notes 73–74 and accompanying text.

18. *Cohen*, 887 N.Y.S.2d at 425.

19. Petitioner's Motion to Show Cause at Exhibit A, *Cohen*, 887 N.Y.S.2d 424 (No. 100012/09).

20. *Id.* at Exhibits A, F.

21. Petitioner's Motion to Show Cause, Order to Show Cause in Lieu of Petition at 5, *Cohen*, 887 N.Y.S.2d 424 (No. 100012/09) ("Nothing like opening wide to take that 'thing' into my mouth AGAIN.").

Around October 9, 2008, Ms. Cohen ran a search of her name on Google.[22] She found the blog in the search results and viewed the posted material.[23] Ms. Cohen was "shocked and embarrassed" by the commentary, believing that the postings described her as "a promiscuous woman."[24] Her attorney contacted Google and asked the company to disclose the blogger's identity so that Ms. Cohen could pursue a defamation claim.[25] Google responded that it would only release the blogger's identity if it was "required to do so pursuant to applicable law, regulation, legal process or enforceable governmental request."[26]

Ms. Cohen subsequently requested a court order for a pre-action disclosure pursuant to section 3102(c) directing Google to provide Ms. Cohen with information revealing the blogger's identity.[27] In support of her motion, Ms. Cohen produced an affirmation from her attorney, an affidavit from herself relating the relevant facts, and evidence filed under Exhibits A–F containing images and text from the blog.[28] Based on this evidence, the court ordered Google to "show cause . . . why an order should not be made, pursuant to section 3102(c), compelling pre-action disclosure" of information revealing the blogger's identity.[29] Google notified the blogger of the ordered proceeding.[30] The blogger then appeared anonymously through counsel and opposed the motion.[31]

B. The Cohen *Court's Legal Analysis*

The court ruled that a plaintiff is entitled to a pre-action disclosure if the plaintiff demonstrates that "she has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong."[32] The court described Ms. Cohen's burden as requiring "a strong showing that a cause of action exists"[33] and that "[a]s a general rule, the adequacy of merit rests within the sound discretion of

22. Petitioner's Motion to Show Cause, Affidavit of Liskula Cohen in Support of Order to Show Cause Compelling Disclosure of Identity at 1, *Cohen*, 887 N.Y.S.2d 424 (No. 100012/09).

23. *Id.*

24. *Id.* at 2.

25. Petitioner's Motion to Show Cause, Affirmation of Daniel J. Schneider in Support of Order to Show Cause Compelling Disclosure of Identity with Memorandum of Law at 2, *Cohen*, 887 N.Y.S.2d 424 (No. 100012/09).

26. *Cohen*, 887 N.Y.S.2d at 425 n.1.

27. *Id.* at 425.

28. Affirmation in Support of Order to Show Cause Compelling Disclosure of Identity at 1–2, *Cohen*, 887 N.Y.S.2d 424 (No. 100012/09).

29. Order to Show Cause at 2, *Cohen*, 887 N.Y.S.2d 424 (No. 100012/09).

30. *Cohen*, 887 N.Y.S.2d at 425.

31. *Id.*

32. *Id.* at 426 (quoting Uddin v. N.Y.C. Transit Auth., 810 N.Y.S.2d 198, 199 (1st Dep't 2006)).

33. *Id.* (quoting David D. Siegel, *Supplemental Practice Commentaries* in N.Y. C.P.L.R. 3102 (McKinney Supp. 2000)).

the court."[34] To prove defamation[35] in New York, a plaintiff must demonstrate that the speech in question is "a false statement, published without privilege or authorization to a third-party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se."[36] Ms. Cohen argued that the blogger's comments constituted defamation per se because they "impugn[ed] her chastity."[37] Further, Ms. Cohen argued that the blogger's statements, particularly the use of "skank" and "ho," were actionable statements of fact rather than of opinion.[38] The blogger argued that the statements were opinion because the statements "skank" and "ho" are not capable of being proven true or false and the context of the statements on a blog "signal[s] readers . . . that what is being read or heard is likely to be opinion, not fact."[39]

The court held that Ms. Cohen "sufficiently established the merits of her proposed cause of action for defamation . . . and that the information sought is material and necessary to identify the potential defendant."[40] Specifically, the court ruled that the words "skank" and "ho," as used in the blogger's commentary, constituted statements of fact rather than of opinion because they were capable of being proven true or false and, when taken in context, conveyed a sense to a reader that the comments were factual in nature.[41]

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34. *Id.* at 427 (quoting Peters v. Southeby's Inc., 821 N.Y.S.2d 61, 66 (1st Dep't 2006)).

35. *See supra* note 6 and accompanying text.

36. *Cohen,* 887 N.Y.S.2d at 427–28 (quoting Dillon v. City of New York, 704 N.Y.S.2d 1, 6 (1st Dep't 1999)). When pleading a defamation claim, a plaintiff "must set forth the particular words allegedly constituting defamation [in the complaint] . . . , and [the complaint] must also allege the time when, place where, and manner in which the false statement was made, and specify to whom it was made." Epifani v. Johnson, 882 N.Y.S.2d 234, 242 (2d Dep't 2009).

37. *Cohen,* 887 N.Y.S.2d at 426; *see* N.Y. Civ. Rights Law § 77 (McKinney 2009) ("In an action of slander of a woman imputing unchastity to her, it is not necessary to allege or prove special damages."); Sydney v. MacFadden Newspaper Publ'g, 242 N.Y. 208, 211–12 (1926) ("Any written or printed article is libelous or actionable without alleging special damages if it tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society."); *Epifani,* 882 N.Y.S.2d at 242–43 ("Generally, a plaintiff alleging slander must plead and prove that he or she has sustained special damages, i.e., the loss of something having economic or pecuniary value. A plaintiff need not prove special damages, however, if he or she can establish that the alleged defamatory statement constituted slander per se. The four exceptions which constitute 'slander per se' are statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman. When statements fall within one of these categories, the law presumes that damages will result, and they need not be alleged or proven." (citations omitted) (internal quotation marks omitted)); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 379 (1977); James v. Gannett Co., 40 N.Y.2d 415, 419 (1976) ("[W]ritten charges imputing unchaste conduct to a woman are libelous per se.").

38. Affirmation of Daniel A. Schneider in Support of Order to Show Cause Compelling Disclosure of Identity with Memorandum of Law at 5, *Cohen*, 887 N.Y.S.2d 424 (No. 100012/09).

39. *Cohen*, 887 N.Y.S.2d at 428 (quoting Gross v. N.Y. Times Co., 82 N.Y.2d 146, 153 (1993)).

40. *Id.* at 427.

41. *Id.* at 428–29.

In coming to this decision, the *Cohen* court analyzed the blogger's statements using a three-factor test established in *Gross v. New York Times Co.*[42] According to *Gross*, a statement is one of fact rather than opinion if: (1) "the specific language in issue has a precise meaning which is readily understood"; (2) "the statements are capable of being proven true or false"; and (3) "either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances . . . signal[s] . . . readers or listeners that what is being read or heard is likely to be" fact, not opinion.[43] The court noted that the determination must be resolved "on the basis of what the average person hearing or reading the communication would take it to mean."[44] While acknowledging the broader language used by the blogger, such as "bitch," the court focused the majority of its analysis on the words "skank" and "ho."[45]

Under the first *Gross* factor, the court analyzed dictionary definitions of "skank" and "ho" to determine that "those words on the Blog can be understood to describe petitioner as sexually promiscuous."[46] The court ruled on the second *Gross* factor that the statements, viewed as captions to the sexually explicit photographs, constituted statements that could be proven true or false.[47] Under the third *Gross* factor, the court ruled that the blog's context, consisting of statements accompanied by sexually provocative pictures, supported the plaintiff's assertion that "the thrust of the Blog is that petitioner is a sexually promiscuous woman."[48] The court dismissed the blogger's arguments about the nature and purpose of blogs as forums of personal opinion.[49]

42. *Gross*, 82 N.Y.2d at 153.

43. *Cohen*, 887 N.Y.S.2d at 428 (quoting *Gross*, 82 N.Y.2d at 153).

44. *Id.* (quoting Steinhilber v. Alphonse, 68 N.Y.2d 283, 290 (1986)).

45. *Id.* at 428–29. The court also addressed the blog's use of the word "whoring." *Id.* at 428. However, that term was used by the blogger as a qualifier for the word "skank." *Id.* Thus, this case comment views the Cohen court's analysis as focusing more heavily on the more prominently used words "ho" and "skank." The blog entry using the term "whoring" in its entirety reads:

> Ok so there are so many nasty bithces [sic] in the NYC scene, so now we can write about them. I would have to say that first place award for "Skankiest in NYC" would have to go to Liskula Gentile Cohen. How old is this skank? 40 something? She's a psychotic, lying, whoring, still going to clubs at her age, skank. Yeah she may have been hot ten years ago, but is it really attractive to watch this old hag straddle dudes in a nightclub or lounge? Desperation seeps from her soul, if she even has one.

Affirmation in Support of Order to Show Cause Compelling Disclosure of Identity, at Exhibit A, *Cohen*, 887 N.Y.S.2d 424 (No. 100012/09).

46. *Id.* at 428.

47. *Id.*

48. *Id.* at 428–29.

49. *Id.* at 429. The court buttressed the dismissal by quoting *dicta* from the Virginia Circuit Court case *In re Subpoena Duces Tecum to Am. Online, Inc.*:

> In that the Internet provides a virtually unlimited, inexpensive, and almost immediate means of communication with tens, if not hundreds, of millions of people, the dangers of its misuse cannot be ignored. . . . Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate

Thus, the court held the blogger's statements constituted statements of fact rather than opinion.[50]

As a result, the court ordered Google to reveal the blogger's identity pursuant to section 3102(c).[51] Google complied, unmasking the blogger as Rosemary Port, another model living in New York City and an acquaintance of Ms. Cohen.[52] Upon learning Ms. Port's identity, Ms. Cohen decided not to pursue her defamation claim, stating that "[t]his is about forgiveness. It adds nothing to my life to hurt hers. I wish her happiness."[53]

II. THE PROPER APPLICATION OF THE *GROSS* STANDARD

Under the *Gross* standard as applied by the *Cohen* court, Ms. Cohen was required to make a prima facie showing of defamation, including a showing that the blogger's statements were statements of fact rather than opinion. The *Cohen* court should have held that the blogger's statements were statements of opinion as a matter of law because the words "skank" and "ho" are not capable of being proven true or false and the context of the statements, taken as a whole, conveys to a reader that the statements are the blogger's opinion rather than statements of fact.[54]

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redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights.

52 Va. Cir. 26, 34 (Va. Cir. Ct. 2000), *rev'd on other grounds*, 542 S.E.2d 377 (Va. Sup. Ct. 2001).

50. *Cohen,* 887 N.Y.S.2d at 429.

51. *Id*. at 429–30.

52. *See* Lachlan Cartwright, Rebecca Rosenburg, & Dareh Gregorian, *Secret Grudge of NY 'Skankies,'* N.Y. Post, Sept. 2, 2009, http://www.nypost.com/p/news/regional/secret_grudge_of_ny_skankies_f6c4ttnK4zchSR51tDJoYJ.

53. *Id.*

54. This case comment does not directly address the court's reasoning on the first *Gross* factor, which requires the determination of "whether the specific language in issue has a precise meaning which is readily understood." *Cohen*, 887 N.Y.S.2d at 428. The *Cohen* court turned to the *American Heritage Dictionary* to define the terms at issue, namely, "ho," "whoring," and "skank." *Id.* According to that dictionary, 'skank' is defined "as 'one who is disgustingly foul or filthy and often considered sexually promiscuous. Used especially of a woman or girl.' Ho is defined as 'slang' for a 'prostitute,' and 'whoring' is defined as 'to associate or have sexual relations with prostitutes' or 'to accept payment in exchange for sexual relations.'" *Id.* (quoting American Heritage Dictionary (4th ed. 2009)). While the court turned to an appropriate authority for guidance on this factor, it failed to take into account the inherent differences between these dictionary definitions and slang usage. Other dictionaries provide alternate definitions for "skank": "to dance rhythmically in a loose-limbed manner," *Skank Definition*, Dictionary.com, http://dictionary.reference.com/browse/skank; "'unattractive woman,' 1970s, from skag in this sense (1920s), of unknown origin," *Skank Definition*, Online Etymology Dictionary *available at* http://www.etymonline.com/index.php?1=s&p=33; "an ugly (young) woman," *Skank Definition*, Dictionary.com, http://dictionary.reference.com/browse/skank. Urban Dictionary, a user-based Internet dictionary that attempts to define slang words as they are currently used, boasts 134 different definitions of "ho." *See* http://www.urbandictionary.com/ (last visited Oct. 4, 2010). Urban Dictionary's entries for "whoring" provide a common second definition of the term as "partaking in a lot of something; overindulging." *Id.* While such information is quite pertinent to the discussion *supra* regarding the second and third *Gross* factors, it fails to undercut the *Cohen* court's reasoning on the first factor. Because "the determination of whether a statement expresses fact or opinion is [a] question of law for the court

A. The Improper Application of the Second Gross *Factor*

The second *Gross* factor questions "whether the statements are capable of being proven true or false."[55] The court devoted one sentence to this important factor and cited no precedent in making its determination that the blogger's statements satisfied it.[56] Courts must understand the use of language "upon the temper of the times, [in] the current of contemporary public opinion," and must acknowledge that "words, harmless in one age, in one community, may be highly damaging to reputation at another time or in a different place."[57] In other words, courts must adjust their rulings to current social mores.[58] Through common use in popular media like music, television, and motion pictures, the once-harsh terms "skank" and "ho" have lost their insidious implications and been transformed into run-of-the-mill insults similar to "jerk" or telling someone she "sucks."[59] Courts have held that words similar to

on the basis of what the average person hearing or reading the communication would take it to mean," the court must make its best deduction of which of these competing definitions best represents the community's view on the terms at hand. *Cohen*, 887 N.Y.S.2d at 428. The court cites a well-renowned dictionary and applied its definitions to the terms; thus the *Cohen* court did not go beyond the bounds of reasonableness in making its determination. *See* Knievel v. ESPN, 393 F.3d 1068, 1084–86 (9th Cir. 2005) (Bea, J., dissenting). The subjective nature of this first *Gross* factor, as seen in the court's ruling on this issue, demonstrates a major issue with current First Amendment jurisprudence: that courts are often forced to determine the defamatory nature of terms that are difficult to define or characterize because of their evolving nature as slang. *See* Walt Wolfram, *The Truth About Change: What, Like, Makes Language Change?*, http://www.pbs.org/speak/words/sezwho/change/ (last visited Oct. 4, 2010). The nature of such a determination demonstrates why the third *Gross* factor, which requires a court to examine the context where and how the statements were made, is extremely important in this analysis. *See Cohen*, 887 N.Y.S.2d at 428.

55. *Cohen*, 887 N.Y.S.2d at 428. (quoting Gross v. N.Y. Times Co., 82 N.Y.2d 146, 153 (1993)).

56. *Id.*

57. Mencher v. Chesley, 297 N.Y. 94, 100 (1947).

58. *See* Ward v. Klein, 809 N.Y.S.2d 832 (Sup. Ct. N.Y. County 2005) ("The court recognizes defendants' argument that changing social mores could affect how certain sexual conduct is viewed by the community, and that what was defamatory per se at one time may no longer be the case."); *see also* Hayes v. Smith, 832 P.2d 1022 (Colo. Ct. App. 1991) (finding that current social mores do not favor a standard presuming damages when statements accuse a defamation plaintiff of homosexuality; thus, not holding statements accusing plaintiff of homosexuality as libel per se); Matthew B. Harrison, *Old Law Applied to New Media Could Spell Trouble for Terrestrial Radio*, Photos & The L. Blog (Sept. 2, 2009), http://www.photosandthelaw.com/2009/09/02/old-law-applied-to-new-media-could-spell-trouble-for-terrestrial-radio; Elizabeth Soja, *Unchaste no longer? The dismissal of Britney Spears' libel lawsuit reflects the courts' changing view of what can be considered defamatory*, 31 The News Media & The L. 20 (2007), *available at* http://www.rcfp.org/newsitems/index.php?i=6379 (quoting Judge Lisa Hart Cole's order stating that "[t]he standard for defamatory statements is constantly changing" and quoting Professor Lisa Pruitt of the University of California School of Law as saying that defamation "norms certainly are shifting").

59. *See* Reno v. Mellon, No. 109856/08, 2009 N.Y. Misc. LEXIS 1562, at *30 (Sup. Ct. N.Y. County 2009) ("[E]ven if use of 'bitch,' 'slut' and 'whore' can be normally understood to impute unchastity to plaintiff[,] in this day and age when such terms are used generically,' [sic] epithets as discussed above, the context of Mellon's statements 'negates any implication of factuality and renders those statements hyperbole or epithets which are exempt from action as slander.'" (quoting Saunders v. Taylor, 800 N.Y.S.2d 356 (Sup. Ct. N.Y. County 2003))). Referring to someone "sucking" is a common insult today that was an actionable term at the beginning of the twentieth century. *See* Frazier v. Grob, 183 S.W. 1083 (Mo. Ct.

"skank" and "ho"[60] are not libelous because they are too vague and thus incapable of being proven true or false, including words considered far more offensive than "skank" or "ho" by our current social mores.[61]

Perhaps the *Cohen* court believed, as Justice Stewart did in the case of obscenity, that a person knows the point when the terms "skank" and "ho" become defamatory "when [one] sees it."[62] While the court did not explicitly make this argument, it did rest its reasoning on the correlation between the posted pictures and the captions containing the libelous statements.[63] This implies that, in the court's view, the pictures amplified the nature of the text beyond the subjective realm and into that of

App. 1916) (reversing the lower court's ruling that defendant calling plaintiff a "cocksucker" was slander per se because the record was unclear whether anyone heard the speech or understood the speech as meaning plaintiff was guilty of the act). Today the phrases using "suck" act as vague insults comparative to "you are not cool" or "I do not like you." *See* Nunez v. A-T Fin. Info., Inc., 957 F.Supp. 438, 440–41 (S.D.N.Y. 1997) (holding the statement "you, you need to suck more. You need to get out your knee pads and start sucking" does not constitute slander per se because the statements are only insinuation); Barber v. Marine Drilling Mgmt., 2002 U.S. Dist. LEXIS 2821, at *2, *19–22 (E.D. La. Feb. 14, 2002) (holding that a supervisor's comments in an employee meeting that other employees could tell plaintiff to "suck their dick" do not rise to the level of defamatory statements); *see also* Soja, *supra* note 58 (pointing out that calling someone a "Communist," or a white person "black" at one time was considered defamatory, and contending that courts are re-examining whether defamation per se should apply to situations where someone is identified as homosexual or when a woman's chastity is called into question). *See generally South Park: The F Word* (Comedy Central television broadcast Nov. 4, 2009).

60. Admittedly, the *Cohen* court correctly notes that the term "ho" can be defined as slang for "prostitute." 887 N.Y.S.2d at 428. Prostitute is a defamatory term capable of being shown true or false. *Id.* However, "ho" has different meanings in different contexts and among different age groups, as exemplified in modern music and other media. In some contexts, the term has taken the meaning of a general insult, separated from its origin. This case comment does not contend that the term "ho" is not a defamatory term in all cases, but only when used as a loose insult as exemplified by the blog. Viewed within the blog's full context, it is clear that the blogger is not accusing Ms. Cohen of prostitution; instead the term is used in a string of other loose, non-actionable insults. *See* James v. Gannett, 40 N.Y.2d 415 (1976) (statements in a newspaper article about a belly dancer, specifically that the plaintiff is paid to keep lonely men company and that "men is her business," are not actionable because when taken in context of the entire article the comments obviously relate to belly dancing rather than prostitution).

61. Ward v. Zelikovsky, 643 A.2d 972, 982 (N.J. 1994) ("'Bitch' in its common everyday use is vulgar but non-actionable name-calling that is incapable of objective truth or falsity."); Seelig v. Infinity Broad. Corp., 119 Cal.Rptr.2d 108, 118 (Cal. Ct. App. 2002) ("The phrase 'big skank' is not actionable because it is too vague to be capable of being proven true or false."); Fleming v. Kane Cnty, 636 F. Supp. 742, 746–47 (N.D. Ill. 1986) (holding that the terms "gutless bastard" and "black son of a bitch" were "offensive, and indecent" but did not constitute defamation per se).

62. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("[U]nder the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." (footnote omitted)).

63. *Cohen*, 887 N.Y.S.2d at 428. The court merely states that "[a]s to the second factor, when the statements on the Blog are viewed in context, as captions to sexually provocative photographs of petitioner, the statements convey 'facts' that are capable of being proven true or false." *Id.* This conclusory statement fails to explain how the pictures are able to transform the alleged defamatory terms into "facts." It implies that if one sees the pictures with the words as captions, they will understand the words as holding a factual basis. Presumably, if the pictures did not hint at any sexual context, the court would

the objective, creating an unarticulated true-false test for the terms at issue.[64] Without the pictures as visual guidance, it is unclear how the court would have proceeded in determining whether a person can factually or truthfully be a "skank" or a "ho."[65] The case law supporting this position, cited in a separate portion of the opinion, is slim at best, and no precedent cited by the court uses the picture-text correlation to demonstrate whether a statement is capable of being proven true or false.[66] Pictures should not elevate subjective insults into objective characterizations;[67] nor should they serve to establish a "know it when I see it" test to determine when a person is in fact acting as a "skank" or "ho." Instead, the pictures, like the text in the captions, are subjective statements controlled by the personal tastes and morals of the viewer.[68] Taken together, the captions and pictures relate a single subjective thought and do not morph into an objective statement capable of meeting a true-false test. Thus, the court should have held that the statements made on the blog were statements of opinion rather than fact.

B. The Cohen *Court's Failure to Examine the Allegedly Defamatory Statements in their Context of a Blog*

The third *Gross* factor asks "whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances . . . signal[s] . . . readers or listeners that what is being read or heard is

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have found against Ms. Cohen on the second *Gross* factor. In this manner, the court avoided setting out a bright line test to determine when someone is in fact a "ho" or a "skank." *Id.*

64. *See Cohen*, 887 N.Y.S.2d at 428; *see also* Harrison, *supra* note 58 ("To my surprise, the court also determined that these statements (as captions to photographs) could be proven true or false. While I am not familiar with a true/false test that determines whether someone is a skank or ho . . . the court obviously believes that one exists.").

65. *See supra* note 63.

66. The *Cohen* court relies on *Regent v. Liberation Publications, Inc.*, 611 N.Y.S.2d 866 (1st Dep't 1994). In *Regent*, the court held the word "lust," placed in a picture advertisement and when taken in context of other sexually suggestive advertisements in a magazine catering to the homosexual community, was defamatory because it "carries a negative overtone of sexual promiscuity." *Id.* at 243. The court did not examine whether the language accompanying the sexually charged advertisement containing plaintiff's image could be proven true or false. The blog allegedly defaming Ms. Cohen contained no advertisements. Further, posts on a blog carry much different connotations than text within a magazine that states an intention to cater to a sexually liberal homosexual community. Thus, *Regent* is distinguishable from *Cohen*. *See also* Ava v. NYP Holdings, Inc., 885 N.Y.S.2d 247 (1st Dep't 2009) (distinguishing *Regent* by pointing to the purpose and expectations of the medium in question, specifically comparing a magazine catering to a sexually liberal audience to a daily newspaper, and the use of defamatory material in sexual advertisements compared to the use of information and pictures in a newspaper article).

67. Knievel v. ESPN, Inc., 223 F. Supp. 2d 1173 (D. Mont. 2002) (holding that a picture of plaintiff with his arms around two women accompanied by a caption identifying plaintiff as a pimp was not defamatory because no one would reasonably believe the picture asserted that plaintiff was actually engaged in prostitution).

68. *See* Byrd v. Hustler Mag., 433 So. 2d 593, 595 (Fla. Dist. Ct. App. 1983) ("When words and pictures are presented together, each is an important element of what, *in toto,* constitutes the publication. Articles are to be considered with their illustrations; pictures are to be viewed with their captions.").

likely to be opinion, not fact."[69] The *Cohen* court ruled that the blog's context relates to sexual promiscuity because it uses words with "sexual overtones" in the captions and in the blog's title.[70] The opinion dismissed the blogger's arguments regarding the purposes and expectations of blogs on the Internet.[71] This dismissal was in error, as the court failed to take into account the particular medium in which these comments were published, readers' perceptions and expectations of anonymous blogs, the overall tone of the blog in question, and the low potential for true injury to Ms. Cohen's reputation. [72]

According to the Merriam-Webster Online Dictionary, a "blog" is "a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer."[73] Dictionary.com defines a "blog" as "an online diary; a personal chronological log of thoughts published on a Web page."[74] Most courts would not consider writings from diaries and personal journals libelous in traditional print form, as these writings are rarely read by the public.[75] The *Cohen* court correctly identified an important difference: blogs are intended and made available for public consumption on the Internet, while diaries are not.[76] But perhaps a better analogy can be made between bloggers and opinionated personalities on radio and television. Indeed, it is difficult to discern how the most entertaining or offensive blogs are any different from bombastic radio and television personalities who are protected under the exemption for statements of opinion.[77] If blogs are not well protected as forums of opinion, the broadcast industry, with its increasing use of opinion-based news programs, could become more susceptible

69. *Cohen*, 887 N.Y.S.2d at 428 (quoting Gross v. N.Y. Times Co., 82 N.Y.2d 146, 153 (1993)).

70. *Id.* at 429.

71. *Id.*

72. *See infra* text accompanying notes 88–90.

73. *Blog Definition*, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/blog (last visited Sept. 20, 2010).

74. *Blog Definition*, Dictionary.com, http://dictionary.reference.com/browse/blog (last visited Oct. 4, 2010).

75. *See* Mills v. Miteq, Inc., No. 06-CV-0752-SJF-AKT, 2008 U.S. Dist. LEXIS 9209, at *7 (E.D.N.Y. Feb. 7, 2008) ("The excerpts from Defendant['s] . . . diary cannot support a defamation claim because Plaintiff has not identified a person to whom these statements were published . . . .").

76. *See Cohen,* 887 N.Y.S.2d at 429 (quoting *In re* Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26 (Va. Cir. Ct. 2000)).

77. *See* Gardner v. Martino, 563 F.3d 981, 992 (9th Cir. 2009) (ruling that after radio host disparaged a company and advised listeners not to purchase its products because the company "sucks," "[b]ased on the 'totality of the circumstances' test, Martino's reliance on the facts as recited by Feroglia was reasonable and the specific context of the radio broadcast indicates that Martino was expressing his opinion and not a factual assertion"); *see also* Harrison, *supra* note 58 ("While it has never been assumed that talk radio is inherently opinion-based, it certainly was a de facto starting point. What happens now that the precedent is that statements on the internet, which seem to be full of opinion, are to be taken as statement of fact? What about for talk radio-something that is less obviously opinion (than the internet)?"); *Imus called women's basketball team 'nappy-headed hos'*, Media Matters for Am., (April 4, 2007, 6:00 PM), http://mediamatters.org/research/200704040011 ("[H]ost Don Imus referred to the Rutgers University women's basketball team . . . as 'nappy-headed hos' immediately after the show's executive producer, Bernard McGuirk, called the team 'hard-core hos.'").

to defamation claims similar to that brought by Ms. Cohen as well.[78] The court's reasoning that a public, online, personal journal contains statements of fact rather than opinion could potentially extend beyond blogs and the Internet into other traditionally protected forms of speech.[79] If given broad acceptance, these arguments may have a significant chilling effect beyond the Internet in areas such as talk radio and opinion-based television programs.[80]

Information available on the Internet, particularly within blogs, has yet to establish itself as authoritative within scholarly circles.[81] Scholarly papers avoid citations to websites because of the ease in which the information on the website may change or be deleted entirely.[82] Wikipedia, the popular user-edited online encyclopedia, provides a wealth of information but is not considered trustworthy; the academic establishment, while praising the novel method of information accumulation, shuns its use as a source of information in scholarly works.[83] This stigma magnifies

78. *See* Reno v. ACLU, 521 U.S. 844 (1997); FCC v. Pacifica, 438 U.S. 726 (1978); Brian Stetler, *Fox's Volley with Obama Administration Intensifying*, N.Y. Times, Oct. 12, 2009, at B1, http://www.nytimes.com/2009/10/12/business/media/12fox.html (noting the increased use of opinionated programs on Fox News).

79. *See* Harrison, *supra* note 58 ("With the broader interpretations being applied tightly to new media, and then being applied to terrestrial media—it is necessary to be aware of this additional exposure to potential liability.").

80. Lidsky, *supra* note 1, at 888. ("[T]he chilling effect occurs when defamation law encourages prospective speakers to engage in undue self-censorship to avoid the negative consequences of speaking.").

81. Nicole A. Stafford, *Lose the Distinction: Internet Bloggers and First Amendment Protection of Libel Defendants—Citizen Journalism and the Supreme Court's Murky Jurisprudence Blur the Line Between Media and Non-Media Speakers*, 84 U. Det. Mercy L. Rev. 597, 600 (2007) ("Web blogs have yet to obtain the status of the mainstream media as authoritative sources of accurate and balanced news and information."); *Transcription Resources: Evaluating & Citing Online Resources*, Transcriptions, http://transcriptions.english.ucsb.edu/resources/guides/learning/evaluating_citing.asp (last visited Sept. 7, 2010) ("The unfiltered and unstable nature of information found on the Web makes the evaluation of online resources a necessity.").

82. The Bluebook: A Uniform System of Citation R. 18, at 151 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005) ("Sources in [electronic media and other nonprint resources] pose special problems because they often lack the permanence and authoritativeness of traditional printed material.").

83. *See* Neil L. Waters, *Why You Can't Cite Wikipedia in My Class*, 50 Comm. ACM 15, 15–17 (Sept. 2007); *see also* Campbell v. Sec'y of HHS, 69 Fed. Cl. 775 (Fed. Cl. 2006) (stating that Wikipedia articles "culled from the Internet do not – at least on their face – remotely meet this reliability requirement." The court identified five reasons why Wikipedia is not an appropriate source. The court further expressed doubt about information from other websites, such as www.webmd.com and www.iowahealth.com); *Reporting from the Internet*, Reuters, Handbook of Journalism (Mar. 12, 2010, 7:10 AM), http://handbook.reuters.com/index.php/Reporting_from_the_internet.

> Online information sources which rely on collaborative, voluntary and often anonymous contributions need to be handled with care. Wikipedia, the online "people's encyclopedia," can be a good starting point for research, but it should not be used as an attributable source. Do not quote from it or copy from it. The information it contains has not been validated and can change from second to second as contributors add or remove material. Move on to official websites or other sources that are worthy of attribution. Do not link to Wikipedia or similar collaborative encyclopedia sites as a source of background information on any topic.

Id.

when anonymously or pseudonymously authored blogs are concerned.[84] While a number of blogs have established themselves as authorities in certain professional areas,[85] many blogs contain the rantings of average people looking to let off steam.[86] As a result, readers take such blogs, especially those with anonymous or pseudonymous authors, with a grain of salt; they mainly read such blogs for entertainment and sensationalism rather than for serious, authoritative accounts of the world.[87] The large number of blogs in existence on the Internet further minimizes the likelihood of Ms. Cohen receiving true injury,[88] especially considering that the blog lacked advertising[89] and was rarely visited.[90]

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84. *See* Lidsky & Cotters, *supra* note 7, at 1597 (quoting Doe v. Cahill, 884 A.2d 451 (Del. 2005)) ("[R]eaders take their cues from context and 'are unlikely to view messages posted anonymously as assertions of fact,' especially when they appear on websites filled with invective and hyperbole."); *see also* Lidsky, *supra* note 1, at 898 ("If the speech of anonymous John Does in cyberspace fosters the search for truth, it is largely by accident.").

85. These blogs are almost exclusively attributable to identified authors considered experts in their fields. A quick examination of legal blogs shows an increasing particularity, with editorial writing focused on extremely niche markets. *See* Internet Defamation L. Blog, http://www.Internetdefamationlawblog.com (last visited Oct. 9, 2010) (providing legal analysis on the narrow topic of defamation on the Internet); SCOTUSblog.com, www.scotusblog.com (last visited Oct. 9, 2010) (established blog providing insight to recent Supreme Court arguments and decisions); Law Memo, www.lawmemo.com (last visited Oct. 9, 2010) (providing legal analysis for a broad range of legal topics); Workplace Prof Blog, http://lawprofessors.typepad.com/laborprof_blog/ (providing legal analysis focused on labor and employment issues).

86. *See* Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008) (noting that within Internet discussions, "[h]yperbole and exaggeration are common, and 'venting' is at least as common as careful and considered argumentation." (quoting Lidsky, *supra* note 1, at 863)); Ciolli, *supra* note 1, at 252 ("The majority of diary bloggers view their blogs as a release, or a way to vent about their problems."); Paul S. Gutman, *Say What? Blogging and Employment Law in Conflict*, 27 Colum. J.L. & Arts 145, 146 (2003) ("While many bloggers still link to sites that inspire their admiration or anger and which they want others to see, the pithy statements have become full sentences and paragraphs of outspoken criticism or praise. Some bloggers make no reference to other websites and use their blogs simply as diaries—as venues for pontificating on a variety of topics. Others entertain hopes of becoming writers. Many others pick a single topic and maintain a running commentary on its evolving state.").

87. *See* Reynolds, *supra* note 9, at 1159 ("The blogosphere, like the Internet as a whole, is a low-trust culture.").

88. According to Technorati.com, a website dedicated to discerning trends within the blogging community, at least 133 million blogs exist on the Internet, and almost one million blogs are created every day. Phillip Winn, *State of the Blogosphere: Introduction*, Technorati (Aug. 21, 2009, 7:38 PM), http://technorati.com/blogging/article/state-of-the-blogosphere-introduction/.

89. *See* Petitioner's Motion to Show Cause at Exhibits A & B, Cohen v. Google, Inc., 887 N.Y.S.2d 424 (Sup. Ct. N.Y. County 2009) (No. 100012/09). The record reveals that the blog did not include advertisements or endorsements on October 8, 2008. Links and advertisements boost a website's popularity in Internet searches; without their help, a webpage will likely become lost in the shuffle. *Link Value Factors*, Wiep.net, http://wiep.net/link-value-factors/LinkValueFactors.pdf.

90. Petitioner's Motion to Show Cause at Exhibit B, *Cohen*, 887 N.Y.S.2d 424 (No. 100012/09) (asserting that comments posted on the blog by "liveandlove" state that through October 8, 2008, only twenty Internet users visited the Blog).

The blog's tone is another important factor missing in the *Cohen* court's analysis. A number of the blogger's comments were written as interrogatories.[91] Such comments do not create a sense that the blogger knows more about Ms. Cohen than the reader; instead the comments are couched in a need for validation and affirmation by asking the reader to comment further on Ms. Cohen's personality.[92] The frequent use of interrogatories creates a tone in which the other comments are read, as if each sentence is followed by "Do you agree?" Courts should not take such commentary as statements of fact, as its structure and content belies the author's need for the information's validation.

Thus, the blog's context is more expansive than the *Cohen* court's narrow examination of its captions and pictures. The "broad social context" of the blog reveals that the blogger published her statements as part of a personal online journal, which was penned anonymously, labeled under a sensational title, rarely visited, unadvertised and without endorsement, seeking validation of its perspective, and published in a medium well-known for providing unreliable opinions.[93] Viewed in this light, it is difficult to understand how a court might believe the blogger's statements—in the eyes of a reasonable Internet user—constituted statements of fact rather than opinion.[94] The *Cohen* court's lax application of the *Gross* standard and its outright refusal to examine blogs as a unique medium creates worry among bloggers speaking anonymously, pseudonymously, or otherwise, many of whom are indeed worthy of protection.[95]

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91. Of the twelve sentences penned by the blogger, four of them inquire whether the reader agrees with the blogger's opinion. *See* Petitioner's Motion to Show Cause at Exhibit A, *Cohen*, 887 N.Y.S.2d 424 (No. 100012/09). The cited sentences read as follows: (1) "Don't you guys think she should grow and an [sic] get on with her life?"; (2) "What kind of guy wants a skank bitch like that?"; (3) "How old is this skank? 40 something?"; (4) "Yeah she may have been hot 10 years ago, but is it really attractive to watch this old hag straddle dudes in a nightclub or lounge?" *Id.*

92. *See* Pub. Relations Soc'y of Am., Inc. v. Road Runner High Speed Online, 799 N.Y.S.2d 847 (2005) (noting that actionable "mixed-opinion" statements imply that the writer knows facts unknown to the reader, while "pure opinion" statements are not actionable when they do not imply a basis in undisclosed facts).

93. *See supra* notes 74–76, 79–82, and accompanying text; Reynolds, *supra* note 9, at 1159 ("Most bloggers focus on opinion . . . ."). *See generally* Lidsky, *supra* note 1, at 931 ("Judge Harry T. Edwards . . . apologized for giving insufficient consideration to the fact that the allegedly defamatory statements had 'appeared in the context of a book review, a genre in which readers expect to find spirited critiques of literary works . . . .'" (quoting Moldea II v. N.Y. Times, Co., 22 F.3d 310, 311 (D.C. Cir. 1994)). The court in *Moldea II* upheld the lower court's decision by ruling in favor of the defendant newspaper. *Moldea II*, 22 F.3d at 311.

94. *See* Reynolds, *supra* note 9, at 1165 (arguing that because of the low-trust culture of blogs, it is unlikely that someone will "change an opinion of another person, famous or obscure, solely because of something read on a blog"); James v. Gannett Co., 40 N.Y.2d 415, 420 (1976) ("It is the duty of the court, in an action for libel, to understand the publication in the same manner that others would naturally do.").

95. *See* Krinsky v. Doe 6, 159 Cal. Rptr. 3d 231, 238 (Cal. Ct. App. 2008) ("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." (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995))). *See generally* James Temple, *Skank Case Precedent Worries Privacy Groups*, The Tech Chronicles, S.F. Chron. (Aug. 20, 2009, 4:10 PM) http://www.sfgate.com/cgi-bin/blogs/techchron/detail?&entry_id=45920.

III. APPLYING A BALANCED STANDARD TO ANONYMOUS INTERNET SPEECH

In the past five years, the Supreme Court of New York has used three separate tests to determine when pre-action disclosure pursuant to section 3102(c) is appropriate to unmask potentially tortious anonymous and pseudonymous Internet speakers.[96] It is imperative that New York establish a uniform standard to end uncertainty over the right of anonymous and pseudonymous Internet speakers to preserve their anonymity.[97] Courts across the country are individually attempting to fashion a standard that protects both the well-established First Amendment right to speak anonymously[98] and the rights

96. While only three courts have actually ruled on the issue, the problem of uncertainty within New York jurisdictions is broader than this number suggests. Over the past six years, New York State and Second Circuit courts have addressed the pre-action disclosure of Internet speakers' identities six times, contemplating five different standards. *See Cohen*, 887 N.Y.S.2d at 424; *supra* notes 32–34 and accompanying text. In *Public Relations Society of America, Inc. v. Road Runner High Speed Online*, the court applied the "meritorious cause of action" standard plus a five-factor test, examining: "(1) whether the claimant has shown a prima facie cause of actionable harm, (2) whether the discovery request was sufficiently specific as to be reasonable likely to lead to the identifying information, (3) whether there was an alternative means to obtain the information, (4) if the information sought was central and necessary to advance the claim, and (5) if the defendant had any reasonable expectation of privacy in the identifying information." 799 N.Y.S.2d at 847 (Sup. Ct. N.Y. County 2005). In *Ottinger v. Non-Party The Journal News*, the court required that a plaintiff (1) provide defendants with timely notice of the proceeding on the Internet forums containing the alleged defamatory material; (2) establish a prima facie claim of all elements within the plaintiff's control; and (3) demonstrate the strength of the prima facie case and the necessity for disclosure outweighs defendant's First Amendment right of anonymous free speech. 2008 N.Y. Misc. LEXIS 4579 (Sup. Ct. Westchester County 2008). In *Greenbaum v. Google, Inc.*, the court held that plaintiff did not set forth a prima facie defamation claim because the statements posted on an Internet site were protected opinion. The court spoke favorably of using a balancing test to protect the First Amendment rights of Internet speakers, but declined to apply the test because the court did not reach the issue. 845 N.Y.S.2d 695 (Sup. Ct. N.Y. County 2008). In *Sony Music Entertainment Inc. v. Does 1–40*, the court established and applied the test borrowed by the court in *Public Relations Society.* 326 F. Supp. 2d 556 (S.D.N.Y. 2004). Finally, in *Doe I v. Individuals*, the court established a six-part test, requiring a court to consider (1) whether the anonymous posters were notified of the proceeding; (2) "whether the plaintiff has identified and set forth the exact statements purportedly made by each anonymous poster that the plaintiff alleges constitutes actionable speech"; (3) "the specificity of the discovery request and whether there is an alternative means of obtaining the information called for in the subpoena"; (4) "whether there is a central need for the subpoenaed information to advance the plaintiffs' claims"; (5) "the subpoenaed party's expectation of privacy at the time the online material was posted"; and (6) whether the plaintiffs made "a concrete showing as to each element of a prima facie case against the defendant." 561 F. Supp. 2d 249, 254–56 (D. Conn. 2008).

97. *See* Anthony Ciolli, *Technology Policy, Internet Privacy, and the Federal Rules of Civil Procedure*, 11 Yale J.L. & Tech. 176, 184 (2008) ("[T]he lack of a uniform standard creates unpredictability. In most jurisdictions, it remains a mystery which test a court will apply to determine whether a civil subpoena may be used to unmask an anonymous speaker."); Jonathan D. Jones, Note, *Cybersmears and John Doe: How Far Should First Amendment Protection of Anonymous Speakers Extend?*, 7 First Amend. L. Rev. 421, 443 (2007) ("Lack of uniformity in determining when to unmask anonymous internet speakers is creating problems in lower courts. No one standard appears to be winning favor, and each jurisdiction that takes up the issue is putting its own stamp on the problem."). *See generally* Nathaniel Gleicher, Note, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 Yale L.J. 320, 325 (2008) (arguing for a nationwide standard, stating that "[o]nly a consistent nationwide standard for John Doe subpoenas will ensure balanced protection for both anonymous online speakers and the targets of anonymous online speech").

98. *See infra* notes 126–27 and accompanying text.

of those injured through unregulated Internet speech.[99] This case comment contends that New York should, in cases where tort claims[100] are brought against anonymous Internet speakers, abandon the "meritorious cause of action" standard for pre-action disclosure and adopt the three-factor test announced in *Mobilisa, Inc. v. Doe 1*.[101]

A. The Mobilisa *Standard*

In *Mobilisa*, the plaintiff brought an action for trespass of chattel and violations of two federal statutes.[102] In this case, an anonymous sender distributed an e-mail written by the chief executive officer of Mobilisa, Inc., to a large number of people, including members of the Mobilisa management team.[103] The e-mail, originally sent to a non-employee of Mobilisa, related intimate details of a romantic nature regarding the chief executive officer's relationship with the intended recipient, and included the subject line, "Is this a company you want to work for?"[104] The plaintiff requested that the court order a pre-action disclosure to identify the anonymous sender.[105] The court ruled in favor of the plaintiff.[106]

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99. *See* Gleicher, *supra* note 97, at 325. ("No fewer than seven different cases have expressed distinct standards over the past nine years. These standards vary widely, making the extent of the right to anonymous speech online uncertain." (citing Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088 (W.D. Wash. 2001))); Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999); Mobilisa, Inc. v. Doe 1, 170 P.3d 712 (Ariz. Ct. App. 2007); Krinksy v. Doe 6, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008); Doe No. 1 v. Cahill, 884 A.2d 451 (Del. 2005); Dendrite Int'l, Inc. v. Doe, No. 3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001); *In re* Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26 (Va. Cir. Ct. 2000), *rev'd on other grounds*, Am. Online, Inc. v. Anonymous Publicly Traded Co., 261 Va. 350 (Va. 2001); *see also* Ciolli, *supra* note 97, at 176–77 (stating that "courts have reached widely divergent results" in fashioning tests to determine when a court should unmask an anonymous Internet speaker).

100. This case comment does not go so far as to suggest applying the *Mobilisa* standard to criminal or civil rights actions, which raise significantly different issues. *See* United States v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009) (reversing a jury verdict that found the defendant had violated a federal statute which prohibits "accessing a computer involved in interstate or foreign communication without authorization or in excess of authorization to obtain information," on charges that arose from cyberbullying and ended in the suicide of a thirteen-year-old girl); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61 (2009) (pointing out a rise in civil liberties and civil rights violations committed by "online mobs" and the need for legal remedies to prevent offline prejudice against traditionally disadvantaged classes from prohibiting the fair and equal use of the Internet).

101. 170 P.3d 715 (Ariz. Ct. App. 2007).

102. *Id.* at 715–16. The claims were brought under 18 U.S.C. §§ 1030, 2701 (2000).

103. *Mobilisa*, 170 P.3d at 715.

104. *Id.*

105. *Id.* at 716. The Arizona Superior Court adopted the "summary judgment standard" from *Doe v. Cahill*. 884 A.2d 451, 460–61 (Del. 2005). Under this standard, a court may order a pre-action disclosure of an anonymous Internet speaker's identity if: "(1) the requesting party makes reasonable efforts to notify the anonymous speaker of the discovery request and that person is afforded a reasonable time to respond, and (2) the requesting party demonstrates its cause of action would survive a motion for summary judgment." *See Mobilisa,* 170 P.3d at 716 (citing *Cahill*, 884 A.2d at 460–61).

106. *Mobilisa*, 170 P.3d at 727.

On appeal, the Arizona Court of Appeals set a new standard for pre-action disclosure of anonymous and pseudonymous Internet speakers' identities in Arizona.[107] The court held that:

to obtain a court order compelling discovery of an anonymous Internet speaker's identity, the requesting party must show that: (1) the speaker has been given adequate notice and a reasonable opportunity to respond to the discovery request, (2) the requesting party's cause of action could survive a motion for summary judgment on the elements of the claim not dependent on the identity of the anonymous speaker, and (3) a balance of the parties' competing interests favors disclosure.[108]

This case comment will address each of these factors in turn.

B. The Notice Requirement

The New York standard should require that the anonymous or pseudonymous Internet speaker receive notice of any court action to unmask her and receive "a reasonable opportunity to respond."[109] Courts tend to include a notice requirement more often than not when fashioning new standards for pre-action disclosure of anonymous Internet speakers.[110] This factor ensures that an anonymous Internet speaker is aware of her potential liability and allows the speaker time to produce an adequate legal defense to the court action.[111] Without a notice requirement, courts can order the unmasking of anonymous and pseudonymous Internet speakers without hearing any argument about why the speech in question should be protected.[112] In order to avoid unduly burdening plaintiffs, the appropriate standard should only require a plaintiff to post the notice on the same Internet forum where the defendant posted the alleged defamatory statements.[113] In situations where a notice posting is impossible, the court should require the involved Internet company to send the anonymous speaker notice via e-mail.

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107. *Id.* at 715, 724.

108. *Id.* at 721.

109. *See id.* at 719.

110. *See* Gleicher, *supra* note 97, at 345 ("Although [the notice requirement] is becoming a more common occurrence, it is certainly not universal."). Of the seven cases identified by Gleicher in note 99, four include a notice requirement. *Id.* at 344; *see also Mobilisa*, 170 P.3d at 719 ("Mobilisa *does not challenge* the requirement set forth in both *Cahill* and *Dendrite* that the requesting party show the anonymous speaker has been given adequate notice and a reasonable opportunity to respond to the discovery request."(emphasis added)).

111. *See* Lidsky & Cotter, *supra* note 7, at 1598.

112. *See Cahill*, 884 A.2d at 461 ("The notification provision imposes very little burden on a defamation plaintiff while at the same time giving an anonymous defendant the opportunity to respond. When *First Amendment* interests are at stake we disfavor *ex parte* discovery requests that afford the plaintiff the important form of relief that comes from unmasking an anonymous defendant.").

113. *Id.*; *see also* Lidsky & Cotter, *supra* note 7, at 1598 ("It is reasonable to require the plaintiff to post notice on the same website, blog, chat room, or other forum where the defendant's allegedly tortious communication was made.").

C. The Required Standard of Proof

New York courts should also require the plaintiff to demonstrate she possesses a reasonable chance of recovery. Almost every court addressing this issue requires some showing of a potential cause of action by the plaintiff before ordering the pre-action disclosure of an anonymous Internet speaker's identity.[114] However, courts differ on the required showing.[115] The *Cohen* court's "meritorious cause of action" standard requires a plaintiff to make a prima facie showing of a cause of action before it will issue a court order for a pre-action disclosure.[116] This standard is stronger than that applied by some courts, placing the plaintiff's burden of proof somewhere between a motion to dismiss and a motion for summary judgment standard.[117] Yet the "meritorious cause of action" standard breeds ambiguity,[118] and thus is too weak and

114. Gleicher, *supra* note 97, at 350 ("[T]he strength of the plaintiff's claim . . . is the most commonly included element in John Doe subpoena standards."). Of the seven cases identified by Gleicher, only one does not include a strength of showing requirement. *See supra* note 99.

115. Other standards employed by courts include: the "good faith" standard, *see In re* Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26, 37 (Va. Cir. Ct. 2000); the "motion to dismiss" standard, *see* Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 579 (N.D. Cal. 1999); the "evidentiary showing of a prima facie case" standard, *see* Dendrite Int'l, Inc. v. Doe, No. 3, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001); the "meritorious cause of action" standard, *see* Cohen v. Google, Inc., 887 N.Y.S.2d 424, 426 (Sup. Ct. N.Y. County 2009), *supra* notes 39–41 and accompanying text; and the "summary judgment" standard, *see Cahill,* 884 A.2d at 460.

116. *Cohen*, 887 N.Y.S.2d at 426. *See supra* notes 32–34 and accompanying text; *see also* Holzman v. Manhattan & Bronx Surface Transit Operating Auth., 707 N.Y.S.2d 159, 160–61 (1st Dep't 2000) ("Pre-action discovery . . . cannot be used by a prospective plaintiff to ascertain whether he has a cause of action at all."); *In re* Stewart v. N.Y.C. Transit Auth., 492 N.Y.S.2d 459, 460 (2d Dep't 1985) ("Where, however, the facts alleged state a cause of action, the protection of a party's affairs is no longer the primary consideration and an examination to determine the identities of the parties and what form or forms the action should take is appropriate." (quoting *In re* Houlihan-Parnes, Realtors, 395 N.Y.S.2d 684 (2d Dep't 1977))); Gleich v. Kissinger, 489 N.Y.S.2d 510, 512 (1st Dep't 1985) ("[P]reaction disclosure . . . to aid in bringing an action, under CPLR 3102(subd[c]), is granted only where the party seeking the disclosure has shown in his affidavits facts which fairly indicate he has some cause of action against the adverse party and, further, that the information he seeks is 'material and necessary' to that actionable wrong.").

117. The *Cohen* court compared the requirement in *Dendrite International* that a plaintiff "produce sufficient evidence supporting each element of its cause of action on a prima facie basis" to the "meritorious cause of action standard." *Cohen*, 887 N.Y.S.2d at 427 n.5. The *Cohen* court stated that the "meritorious cause of action standard" was sufficient "to address the constitutional concerns raised in this context." *Id.* Both standards require that a plaintiff adduce some evidentiary showing of a prima facie claim. *See Dendrite Int'l,* 775 A.2d at 760; *see also In re* Stump v. 209 E. 56th St. Corp., 622 N.Y.S.2d 517 (1st Dep't 1995).

118. It is clear that New York's "meritorious cause of action" standard requires a plaintiff to adduce some type of evidence of a prima facie claim. Yet courts do not provide guidance as to the required strength of that evidence. The case-by-case analysis employed under this standard results in the application of both strict and permissive standards. *Compare* Stewart v. Socony Vacuum Oil Co., 163 N.Y.S.2d 22, 24 (3d Dep't 1957) ("The party seeking the examination ought to disclose under oath facts which will fairly indicate he has some cause of action against the adverse party. He need not, of course, either name it correctly or state it with technical precision, but as a matter of judicial policy he ought to be required to show, within the frame of rule 122 of the Rules of Civil Practice that the examination he seeks is 'material' and 'necessary' to some actionable wrong."), *and* Stewart v. N.Y.C. Transit Auth., 492 N.Y.S.2d

unpredictable to properly protect the rights of both anonymous Internet speakers and Internet tort plaintiffs.[119] As noted in *Mobilisa*, similar prima facie standards "set the bar too low, chilling potential speakers from speaking anonymously on the Internet."[120] Weak standards allow plaintiffs to, in bad faith, obtain orders unmasking anonymous Internet speakers in situations where they are unlikely to succeed on a cause of action.[121] This grants powerful plaintiffs the ability to silence and retaliate against anonymous Internet critics by compelling Internet companies to divulge their identities.[122] A summary judgment standard, as set forth in *Mobilisa*, would end ambiguity in New York courts by clearly stating the evidentiary requirements expected by the court. Further, such a standard would properly protect anonymous Internet speech while also providing plaintiffs with good faith defamation claims the opportunity to recover their losses.[123]

459, 60 (2d Dep't 1985) (requiring that "the facts alleged state a cause of action" for plaintiff to succeed on his pre-action disclosure motion), *with* Ero v. Graystone Materials, Inc., 676 N.Y.S.2d 707, 708–09 (3d Dep't 1998) (requiring that a petitioner demonstrate a prima facie case, and that the "documents submitted to demonstrate the existence of a prima facie cause of action" are "based on first-hand knowledge," and borrowing language from *McCummings v. N.Y.C. Transit Authority*, 81 N.Y.2d 923, 926 (1993), which discussed a movant's burden on a judgment notwithstanding the verdict (JNOV) under New York Civil Procedure Law and Rules section 4404(a), arguably a more difficult standard to overcome than a summary judgment standard), *and* Toal v. Staten Island Univ. Hosp., 752 N.Y.S.2d 372 (2d Dep't 2002) (following *Ero's* strict standard, denying petitioner's motion for pre-action disclosure after providing affidavits and an affirmation because the evidence lacked an affirmation or affidavit from a medical expert, a requirement to succeed on a motion for summary judgment). *Toal* is exemplary of the ambiguity and uncertainty issues, as the court departed from Second Department precedent in this ruling by applying *Ero's* analysis, a Third Department case. Thus, the plaintiff in *Toal* was left in the dark about what strength of evidentiary showing the court expected. The use of a summary judgment standard would end this ambiguity and allow courts to rest their decisions on a set evidentiary standard. *See also* Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 457 (Md. 2009) (Adkins, J., concurring) ("[T]he majority is not clear whether or not a plaintiff must make this prima facie showing by an affidavit, deposition, or other statement under oath, or whether mere allegations of fact are sufficient. . . . [T]he Bar and the Bench would be better served if the majority would clarify this point.").

119. *See* Ciolli, *supra* note 97, at 185 ("When fundamental First Amendment and privacy rights are at stake, consistent decision making among the federal courts is needed."); Gleicher, *supra* note 97, at 353 ("Prima facie standards do vary . . . across substantive claims (a prima facie showing of libel is different from a prima facie showing of trademark infringement).").

120. *Mobilisa, Inc. v. Doe 1*, 170 P.3d 712, 719 (Ariz. Ct. App. 2007).

121. *See* Jones, *supra* note 97, at 429 ("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."); Lidsky, *supra* note 1, at 876–77 (Lidsky points out that corporations often use Internet defamation lawsuits as part of public relations campaigns, believing that while they will not recover economically from an Internet John Doe, other economic reasons make it "rational to sue the pseudonymous posters.").

122. *See* Jones, *supra* note 97, at 429.

123. Gleicher, *supra* note 97, at 352 ("This [summary judgment] standard provides a more specific, measurable level of protection for defendants.").

Critics argue that the summary judgment standard places too great a burden on the plaintiff.[124] Professor Elizabeth Malloy contends that this standard requires a plaintiff to prove her claim before even obtaining the defendant's identity, thereby preventing plaintiffs with good faith claims from obtaining the facts required to draft a well-pleaded complaint.[125] This argument fails for two reasons: the nature of the tort claims at issue and the actual burden placed on the plaintiff. The information required to demonstrate a defamation claim for the purposes of summary judgment lies at the plaintiff's fingertips. The exact wording of the statement about the plaintiff, the context in which it was made, the nature of the comments, and the ability to show the statements are false are all within the plaintiff's possession from her first notice of the statement.[126] While the discovery process may lead the plaintiff to a more exact understanding of a plaintiff's injury, or in some cases evidence demonstrating malice by the defendant,[127] the *Mobilisa* standard does not require a plaintiff to demonstrate any facts that can only be obtained through knowledge of the speaker's identity.[128]

The purpose of bringing these sorts of defamation claims is not monetary recovery;[129] anonymous speakers are usually not deep pockets.[130] Instead, these cases

124. *See* S. Elizabeth Malloy, *Bloggership: How Blogs Are Transforming Legal Scholarship: Anonymous Bloggers and Defamation: Balancing Interests on the Internet*, 84 Wash. U. L. Rev. 1187, 1190–92 (2006); Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards*, 83 Or. L. Rev. 795, 810 (2004) (arguing that a heightened standard makes it difficult for plaintiffs to determine whether litigation would be financially worthwhile); *see also* Daniel J. Solove, *A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere*, 84 Wash. U. L. Rev. 1195, 1200 (2006) ("[Speech and privacy] are certainly serious problems, but the solution shouldn't be to insulate bloggers from the law.").

125. Malloy, *supra* note 124, at 1190–93.

126. In New York, "§ 3016(a) requires that in a defamation action, 'the particular words complained of . . . be set forth in the complaint.' The complaint also must allege the time, place and manner of the false statement and specify to whom it was made." Dillon v. City of New York, 704 N.Y.S.2d 1, 5 (1st Dep't 1999) (quoting N.Y. C.P.L.R. 3016(a) (2009)). Because the court will not require a plaintiff to demonstrate information dependant on the defendant's identity, these pleading requirements will not unduly burden a plaintiff attempting to bring a defamation claim. *See infra* note 127 and accompanying text.

127. *See In re* Gleich v. Kissinger, 489 N.Y.S.2d 510 (1st Dep't 1985) (holding that a petition for pre-action disclosure under the "meritorious cause of action" standard failed because petitioner, a public figure, did not produce evidence of malice). The *Mobilisa* standard avoids this problem by not requiring a plaintiff to demonstrate information that is dependent on the defendant's identity. 170 P.3d at 719.

128. *Mobilisa*, 170 P.3d at 720 ("We . . . require the requesting party to demonstrate it would survive a motion for summary judgment filed by Doe on all of the elements within the requesting party's control—in other words, all elements not dependent upon knowing the identity of the anonymous speaker."); *see also* Ciolli, *supra* note 97, at 187 (stating that the test "considers the strength of the plaintiff's case at an earlier stage in the proceedings than is typical—however, this is balanced by plaintiffs not having to demonstrate a likelihood of success on issues that are dependent on the speaker's identity").

129. *See* Lidsky, *supra* note 1, at 872 ("[T]he sudden surge in John Doe suits stems from the fact that many defamation actions are not really about money.").

130. In 1996, Congress passed section 230 of the Communications Decency Act, which, "as interpreted," by the courts "gives [Internet Service Providers] complete immunity from liability for defamatory content initiated by third parties, even if the ISP consciously decides to republish the defamatory content."

are generally brought to silence Internet speech or to identify whistleblowers for intimidation and retaliation purposes.[131] Thus, worries about a heightened standard are ill-founded, as the courts will only require a plaintiff to produce evidence that she can easily obtain.[132] Further, this standard will require plaintiffs to demonstrate the merits of their claim; by doing so, the standard will prevent intimidation by powerful plaintiffs without good-faith causes of action who are attempting to unmask and silence pesky Internet speakers.

D. The Balancing Test Requirement

Finally, the New York standard should include a balancing test. It is well settled that offensive opinions and rhetorical hyperbole are protected forms of speech under the First Amendment of the U.S. Constitution.[133] The New York State Constitution is more expansive, offering broader free speech protections for opinion and rhetorical hyperbole than the U.S. Constitution.[134] The U.S. Supreme Court has long held that

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Lidsky, *supra* note 1, at 871. This statute left "defamation victims with no deep pocket to sue." *Id.* at 872. *See* Reynolds, *supra* note 9, at 1158 ("Most bloggers aren't as impecunious as The Homeless Guy, but few make tempting financial targets.").

131. *Mobilisa*, 170 P.3d at 720 ("Requiring the requesting party to satisfy [a summary judgment standard] furthers the goal of compelling identification of anonymous Internet speakers only as a means to redress legitimate misuses of speech rather than as a means to retaliate against or chill legitimate uses of speech."). Lidsky, *supra* note 1, at 860, 877 ("[T]he goals of this new breed of libel action are largely symbolic, the primary goal being to silence John Doe and others like him. . . . Although corporations that sue John Doe may never recover money damages, they may still deem it economically rational to sue the pseudonymous posters who make negative statements about them on financial message boards."); Ekstrand, *supra* note 1, at 408–09 ("In libel cases especially, some plaintiffs, upset by critical but not necessarily illegal actions of an anonymous author, seek to unmask online users simply to stop the criticism.").

132. *See* Ciolli, *supra* note 97, at 179 (explaining that "[a]ny standard other than the highest level of scrutiny thus fundamentally jeopardizes 'the rich, diverse, and far ranging exchange of ideas' that 'Internet anonymity facilitates'").

133. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press."); Gitlow v. New York, 268 U.S. 652, 666 (1925) ("[W]e may and do assume that freedom of speech and of the press—which are protected by the *First Amendment* from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the *due process clause of the Fourteenth Amendment* from impairment by the States."); *see* Hustler Mag. v. Falwell, 485 U.S. 46, 50 (1988); Old Dominion Branch v. Austin, 418 U.S. 264, 286 (1974).

134. N.Y. Const. art. I, § 8 ("Every citizen may freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."); *see* Immuno AG v. Moor-Jankowski, 77 N.Y.2d 235, 249 (1991) (stating that the New York Constitution provides a broader freedom of the press than the U.S. Constitution); Mann v. Abel, 10 N.Y.3d 271, 279 (2008) ("Expressions of opinion . . . are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation."); Roth v. United Fed'n of Teachers, 787 N.Y.S.2d 603, 611 (Sup. Ct. Kings County 2004) ("[S]tatements of opinion are absolutely privileged and shielded from claims of defamation under art. I, § 8 of the NY Constitution, no matter how vituperative or unreasonable the opinions may be.").

the First Amendment protects anonymous speech.[135] In *Reno v. ACLU*, the Supreme Court extended those protections to statements made on the Internet.[136] Despite such freedoms, courts limit free speech with tort claims like defamation.[137] Any standard determining when a court may order the unmasking of anonymous and pseudonymous Internet speakers requires a balancing test to address the competing policy considerations between the rights of the anonymous speaker and the potential tort plaintiff.[138] Without balancing an individual's First Amendment right to speak anonymously against a potential plaintiff's right to recover for an injury, speech worthy of protection could be stifled through pre-action disclosure even with a summary judgment requirement.[139] This would create a significant chilling effect on Internet speech, causing whistleblowers and others whose speech benefits society to censor or omit their opinions when publishing on the Internet.[140] It is well-documented that

135. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) (striking down an Ohio law prohibiting the distribution of pamphlets about ballot issues without attribution, including author's name and address, because such a statute hinders contributions to the marketplace of ideas and hinders the protected right of author autonomy, and stating anonymity "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"); *see also* Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150 (2002); NAACP v. Button, 371 U.S. 415 (1963); Talley v. California, 362 U.S. 60 (1960).

136. 521 U.S. 844, 870 (1997) (The Internet allows "any person with a phone line" to "become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. We agree . . . that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.").

137. *See supra* note 6 and accompanying text.

138. *Mobilisa, Inc. v. Doe 1*, 170 P.3d 712, 720 (Ariz. Ct. App. 2007) ("[R]equiring the court to balance the parties' competing interests is necessary to achieve appropriate rulings in the vast array of factually distinct cases likely to involve anonymous speech.").

139. Consider the following example: Steve, an aide for Congressional Representative *X* ("*X*"), anonymously blogs this commentary: "*X* is nothing but a lewd, dirty, slut. She sleeps with all of her co-workers, guys and girls alike. She even uses State funds to pay prostitutes for sexual favors. I know, because I work for her." The first two statements are false, but the last two statements are true. While Congress investigates the allegations, *X* brings a libel suit against the anonymous blogger for the two false statements. Using a summary judgment standard, the court finds the statements libelous per se because the false statements imply statements of fact, are distributed to the public on the blog, and imply that *X* is sexually promiscuous and a homosexual. (*X* would not need to demonstrate malice because that information is contingent on having knowledge of Steve's identity.) Without a balancing test, a court will not be able to prevent the pre-action disclosure of Steve's identity to protect the legitimate political speech of his third statement, which was made in the public's interest. While Steve may not be a deep pocket, *X* is now free to obtain Steve's true identity and to retaliate against Steve for blowing the whistle.

140. *See* Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) (acknowledging that a fear of courts unmasking anonymous Internet speakers "would have a significant chilling effect on Internet communications and thus on basic *First Amendment* rights"); Doe No. 1 v. Cahill, 884 A.2d 451, 457 (Sup. Ct. Del. 2005) (reasoning that a "'sue first, ask questions later' approach, coupled with a standard only minimally protective of the anonymity of defendants, will discourage debate on important issues of public concern as more and more anonymous posters censor their online statements in response to the likelihood of being unmasked"); Lidsky, *supra* note 1, at 889 ("[T]hese new libel suits may chill simply by threatening to reveal the identities of those who speak their minds online. . . . As more and

over the past fifteen years, as courts have faced cases involving anonymous and pseudonymous Internet speakers with greater frequency,[141] large employers and powerful government officials have used weak pre-action disclosure standards as a method for intimidating and retaliating against whistleblowers attempting to warn the public about corruption or illegal activity.[142] The disparity between the weak and strong standards in different jurisdictions creates forum-shopping opportunities for these powerful interests, adding to anonymous Internet speakers' vulnerability.[143] Thus, a balancing test weighing the rights of an injured plaintiff against the value of the speech in question is necessary to prevent intimidation and to ensure Internet speakers are able to continue to exercise their First Amendment right of anonymous free speech. It provides courts with a necessary stop-valve to guard speech intended for protection by the U.S. and New York Constitutions that a summary judgment standard could not protect by itself.[144]

Therefore, New York courts should abandon the "meritorious cause of action" test in favor of the three-factor *Mobilisa* test.

IV. CONCLUSION

What did the *Cohen* court's decision accomplish? It can be argued that the New York Supreme Court's decision did more harm than good. In the end, Ms. Cohen did not bring a defamation lawsuit.[145] Ms. Port is currently attempting to sue Google for complying with the court order.[146] The media, including many websites, had a field day with the issue, providing both Ms. Cohen and Ms. Port with large amounts

more suits are filed, many Internet users will come to recognize the ease with which their online anonymity can be stripped simply by the filing of a libel action, and they will censor themselves accordingly.").

141. *See* Ciolli, *supra* note 97, at 176 ("The issue has become especially important in recent years, as plaintiffs are increasingly using the civil subpoena process to force anonymous Internet speakers to unveil their identities.").

142. *See* Lidsky, *supra* note 1, at 889, 903 ("[C]orporate plaintiffs easily can make out a prima facie libel claim any time they receive harsh criticism online. Once a complaint is filed, it is a simple matter to get a subpoena to force the ISP to divulge the anonymous defendant's identity. . . . Although many of the new libel plaintiffs are powerful corporate Goliaths suing to punish and to deter their critics, some are not.").

143. *See* Ciolli, *supra* note 97, at 185 ("Without a uniform standard, plaintiffs who seek to silence, intimidate, or otherwise harass their anonymous critics can also forum shop to take advantage of the radically different tests applied by the various courts.").

144. *See* Mobilisa, Inc. v. Doe 1, 170 P.3d 712, 720 (Ariz. Ct. App. 2007) ("[W]ithout a balancing step, the superior court would not be able to consider factors such as the type of speech involved, the speaker's expectation of privacy, the potential consequence of a discovery order to the speaker and others similarly situated, the need for the identity of the speaker to advance the requesting party's position, and the availability of alternative discovery methods.").

145. *See supra* text accompanying notes 52–53.

146. George Rush, *Outed Blogger Rosemary Port Blames Model Liskula Cohen for 'Skank' Stink*, N.Y. Daily News (Aug. 23, 2009, 7:44 AM), http://www.nydailynews.com/gossip/2009/08/23/2009-08-23_outted_blogger_rosemary_port_blames_model_liskula_cohen_for_skank_stink.html.

of publicity. Blogs continue to publish offensive comments about Ms. Cohen.[147] Although it would be unfair to speculate as to Ms. Cohen's motives in this litigation, we do know this: the *Cohen* court's opinion served only to delete a poorly visited blog and publicly embarrass its author.

The instability in New York surrounding pre-action disclosure of anonymous and pseudonymous Internet speakers' identities must end. While many anonymous and pseudonymous opinions on the Internet are petty and trite, others provide meaningful and beneficial information that helps fuel and shape contemporary public debate. Internet commentary must be taken in its broad social context, and such context should reflect the thoughts and impressions of today's reasonable Internet user. Authors of political and critical opinion choose anonymity for a reason: to protect themselves against threats of intimidation and retaliation by the powerful interests those opinions indict. New York needs a new, uniform standard to protect these anonymous Internet speakers; the three-factor *Mobilisa* test is the proper standard to adopt.

147. *See Liskula Cohen Skank Really Big Blogspot*, Liskula Cohen (Aug. 28, 2009, 8:50 AM), http://liskulacohenskankreallybig.blogspot.com; Mike Payne, *Liskula Cohen vs. Rosemary Port: Who's Hotter?*, Style Crave (Aug. 29, 2009), http://stylecrave.com/2009-08-24/liskula-cohen-vs-rosemary-port-whos-hotter/ (presenting pictures of both models and a quiz where a viewer may vote for either "Liskula Cohen," "Rosemary Port," "Both!," or "Ugh, Skanks!" with twenty percent of the anonymous voters choosing the "Ugh, Skanks!" option).