A Blogger, Google, and a "Skank": An Analysis of Whether Google Has a Fiduciary Obligation to Its Bloggers

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A BLOGGER, GOOGLE, AND A “SKANK”: AN ANALYSIS OF WHETHER GOOGLE HAS A FIDUCIARY OBLIGATION TO ITS BLOGGERS

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I. INTRODUCTION

Liskula Cohen is a Canadian-born model that is currently living in New York.\(^1\) Until recently, she was best known for modeling for Australian *Vogue*, Armani, Versace, *Elle*, and *Cleo*.\(^2\) She will now be known as the "Skankiest in NYC."\(^3\) Why? Because a blog entitled "Skanks in NYC" dubbed her this.\(^4\) The blog also stated that Liskula was a "psychotic, lying, whoring . . . skank" and "a desperate 'fortysomething' who was past her prime."\(^5\) Liskula sought redress for these remarks by filing a defamation suit in state court.\(^6\) Because the blog's author was anonymous, she filed a motion to seek the identity of the blogger, serving this motion upon Google, the owner of the website.\(^7\) As a policy matter, Google would not reveal the identity of the blogger without a court order.\(^8\) A Manhattan trial judge, Joan Madden, eventually ordered Google to turn over all "information that would assist in ascertaining the identity of [the blogger]."\(^9\)

As a result of this court order, Google turned over the relevant information, revealing that Fashion Institute of Technology student Rosemary Port was the author of the "Skanks in NYC" blog.\(^10\) After having her identity revealed, Port has expressed that she is not satisfied at all with the representation that Google gave her during its opposition to Liskula's motion.\(^11\) She stated:

> When I was being defended by attorneys for Google, I thought my right to privacy was being protected . . . . But that right fell through the cracks. Without any warning, I was put on a silver platter for the press to attack me. I would think that a multi-


\(^4\) Id.

\(^5\) Id.


\(^7\) Zetter, *supra* note 3.

\(^8\) Davis, *supra* note 6.


\(^11\) Id.
billion dollar conglomerate would protect the rights of all its users.\textsuperscript{12}

As a result, Port then discussed the idea of filing suit against Google, the blog site owner. Her attorney, Salvatore Strazzullo, explained that Port’s suit would allege that Google “breached its fiduciary duty to protect her expectation of anonymity.”\textsuperscript{13} This allegation gives rise to an interesting question: Does Google, or for that matter any website, owe a fiduciary duty to its users?

The purpose of this Note is to address the question whether a blog site owes a fiduciary duty to its users that requires it to aggressively oppose any motion seeking to release that user’s confidential information. In the background section, this Note first examines a bloggers’ expectation of privacy; more specifically, it examines how the United States Constitution protects anonymous speech and the extent to which this protection has expanded into the realm of cyberspace. This section also examines the three primary tests courts use to evaluate whether a website owner should “unmask” an anonymous blogger. The background section next examines the duty that Online Service Providers\textsuperscript{14} (“OSPs”) have in protecting the rights of its users by evaluating the questions whether OSPs have standing to protect these users’ privacy rights and whether an OSP must provide notification to the user of a subpoena request. The background section then briefly examines any potential liability an OSP may have for third-party content before, finally, examining the types of recourse, if any, an anonymous blogger has outside of breach of fiduciary duty allegations when he or she has been unmasked.

In its analysis section, this Note examines the arguments for and against a finding that an OSP has a fiduciary duty to its blogger users. This section begins with an update to current anonymous blogger litigation. This section then reviews what Google did to protect the anonymity of the blogger in the “Skanks in NYC” case. The analysis section proceeds to briefly discuss the legal principles surrounding fiduciary duty and agency relationships. This section then discusses the arguments for and against the formation of a fiduciary relationship between a user and an OSP. Finally, the analysis section gives two recommendations for what OSPs can do to protect against the formation of a fiduciary relationship between itself and a user.

\textsuperscript{12} Id.

\textsuperscript{13} Id.

\textsuperscript{14} Online Service Providers (“OSPs”) refer to any provider of Internet service, including a social networking site, a company running a blog, etc. This is broader than an Internet Service Provider, which is merely a company providing access to the Internet. See KENT D. STUCKEY, INTERNET AND ONLINE LAW § 2.03 (2010).
II. BACKGROUND

Before discussing whether a fiduciary duty exists between an OSP and a user, it is important to understand some of the basic constitutional parameters surrounding anonymous blogging in cyberspace and the procedural and legal aspects to seeking a court order to reveal the identity of an anonymous blogger. As such, the background section discusses: (1) the constitutional protections afforded to bloggers and the various legal standards that courts apply to determine whether a blogger’s identity should be revealed, (2) whether an OSP has standing to challenge the subpoena on behalf of the user and what notification steps an OSP must take to notify the user of a subpoena, (3) what liability an OSP has for third-party content posted on sites that it hosts, and (4) what recourse, if any, a blogger has after being unmasked outside of breach of fiduciary duty allegations.

A. Bloggers’ Expectation of Privacy and How to Unmask the Anonymous Blogger

1. Constitutional Protection for Anonymous Speech

Anonymous commentary has played an important role in society, and is often credited with identifying solutions for political, social, and cultural challenges as well as promoting unconventional ideas. Anonymous pamphleteering has long been considered part of the nation’s “honorable tradition of advocacy and of dissent.” In fact, numerous anonymous texts, including the Federalist Papers, are believed to have decisively influenced “the progress of mankind.”

“The United States Supreme Court has long held that the First Amendment protects an author’s right to remain anonymous.” For example, in Talley v. California, the Court struck down a city ordinance prohibiting all anonymous leafleting. The Court reasoned that “identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance.” The Court continued to explain that “persecuted groups and sects from time to time

17 Protections, supra note 15, at 770 (citing Talley v. California, 362 U.S. 60, 64–65 (1960)).
19 Talley, 362 U.S. at 66.
20 Id. at 65.
throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."21

Furthermore, in McIntyre v. Ohio Elections Commission, the Court struck down a state law prohibiting the distribution of anonymous campaign literature.22 The Court reasoned that an author’s decision to remain anonymous is an important aspect of the freedom of speech protected by the First Amendment.23 The Court stated: “Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.”24

This right to speak anonymously has been extended into cyberspace by many courts in the past fifteen years.25 For example, in American Civil Liberties Union v. Miller, a federal district judge struck down a Georgia statute prohibiting the transmission of data on the Internet “if such data uses any individual name . . . to falsely identify the person.”26 The court reasoned that a speaker’s identity is part of the content of the speech and that this statute would have a chilling effect on “the many Internet users who use pseudonyms online.”27 The court rejected the state’s argument that the statute only applies to individuals sending data with fraudulent intent, noting that preventing fraud was a compelling government interest, but the statute was not narrowly tailored as it applied to both fraudulent and non-fraudulent speech.28

Although online or offline anonymous speech is provided with some First Amendment protection, this right is not absolute.29 As one commentator explained, anonymous speech is better termed a “qualified privilege” because it “must be balanced against the plaintiffs’ interests.”30 The United States Supreme Court, however, has not yet provided any guidance for the proper calculus for determining when an anonymous speaker’s identity must be revealed.31 As a result, state and federal courts have developed a range of standards that

21 Id. at 64.
23 Id.
24 Id. at 357.
25 Spencer, supra note 18, at 497; Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997) (“[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the internet].”).
27 Spencer, supra note 18, at 497.
28 Miller, 977 F. Supp. at 1232.
31 Protections, supra note 15, at 720.
plaintiffs must satisfy in order to obtain the information needed to reveal a speaker’s identity.\(^{32}\)

2. The Process to Unmask an Anonymous Blogger

It is instructive to understand the process leading to a court’s determination of the question whether to reveal the anonymous Internet user’s identity. First, when a plaintiff feels that an online posting by an anonymous author has defamed him or her, the plaintiff may file a “John Doe” action.\(^{33}\) John Doe is “an entirely fictional character,” on whose behalf plaintiffs could bring suits.\(^{34}\) This technique is used to enable the initiation of proceedings against an unknown defendant,\(^{35}\) which then allows the plaintiff to rely upon “court-sanctioned discovery tools to identity” the unknown defendants.\(^{36}\)

Once the action has been filed, the plaintiff can pursue either the issuance of a third-party subpoena or any other available discovery device to the OSP that knows the identity of the defendant.\(^{37}\) At this point, the anonymous blogger can fight the order through his or her attorney while remaining anonymous.\(^{38}\) When the subpoena is challenged, the court then must balance the competing interest of the author’s First Amendment right to remain anonymous and the plaintiff’s right to seek redress for injuries.\(^{39}\) As one court explained, courts must choose a “standard such that aggrieved parties can obtain remedies, but cannot demand the court system unmask every insolent, disagreeable, or fiery anonymous online figure.”\(^{40}\)

3. Applicable Legal Standards to Evaluate Whether to Unmask a Blogger

Three main approaches have developed to evaluate whether anonymous Internet bloggers’ identities should be revealed.\(^{41}\) These three standards are known as: “The Motion to Dismiss Standard,”\(^{42}\) “The Summary Judgment

\(^{32}\) Id.

\(^{33}\) 2 RODNEY A. SMOLLA, LAW OF DEFAMATION § 12:24.60 (2d ed. Database updated 2009).


\(^{35}\) Gleicher, supra note 18, at 327.

\(^{36}\) Id.

\(^{37}\) SMOLLA, supra note 33.


\(^{39}\) Protections, supra note 15, at 718.


\(^{41}\) Lewis, supra note 38, at 954–57.

Standard," and "The Good Faith Basis Standard." Each of these tests places a different level of burden on the plaintiff to present facts sufficient to unmask the anonymous author.

a. The Motion to Dismiss Standard

The "Motion to Dismiss Standard" was first introduced by a New Jersey Appellate Court in Dendrite International, Inc. v. Doe. Dendrite, a corporation, brought a defamation action against John Doe defendants for posting comments on a Yahoo! Bulletin board. The comments were critical of Dendrite's direction and changes to its revenue recognition accounting. Dendrite initiated a suit against Doe and then filed a motion seeking the OSP to show cause as to why Doe's identity should not be revealed. In denying its motion, the Dendrite court announced a four-step process for trial courts to follow when determining whether to compel an OSP to disclose the identity of an anonymous Internet poster:

(1) require the plaintiff to notify defendants that they are the subject of a subpoena and withhold action until they have a reasonable amount of time to respond;

(2) require the plaintiff to identify the exact defamatory statements;

(3) require the plaintiff to set forth in his complaint a prima facie cause of action that can survive a motion to dismiss for failure to state a claim, as well as evidence supporting each element of the cause of action; and

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43 See Doe v. Cahill, 884 A.2d 451, 454 (Del. 2005).
46 Dendrite, 775 A.2d at 760.
47 Id.
48 Id. at 763.
49 Id.
(4) balance the defendant's First Amendment rights against the strength of the plaintiff's case.\(^{50}\)

What this means, under *Dendrite*, the defamed plaintiff not only has the burden of setting forth his case to a degree which will withstand a motion to dismiss, but also must give notice to the defendants that they are subject to a subpoena, prior to a court unmasking an anonymous blogger. Following the *Dendrite* decision, this test has been followed in a number of jurisdictions.\(^{51}\) In fact, one commentator noted "it appears that the groundswell is moving slightly . . . in the direction of the [motion to dismiss] test announced by the *Dendrite* court."\(^{52}\) This test is identified as being the most protective of anonymous speech because of the court's balancing of the defendant's First Amendment rights against the strengths of the plaintiff's case.\(^{53}\)

b. The Summary Judgment Standard

The "Summary Judgment Standard" was first announced by the Delaware Supreme Court in *Doe v. Cahill*.\(^{54}\) In *Cahill*, Councilman Patrick Cahill filed a defamation suit against four anonymous defendants for comments made on an Internet blog regarding his performance as councilman in Smyrna, Delaware.\(^{55}\) For example, one comment stated, "Anyone who has spent any amount of time with Cahill would be keenly aware of such character flaws, not to mention an obvious mental deterioration."\(^{56}\) The trial court ordered the OSP to disclose the identity of the anonymous defendant and one of the anonymous Does appealed to the Delaware Supreme Court.\(^{57}\)

Following an examination of the "Motion to Dismiss Standard," the court expressed concern that setting a low standard for plaintiffs to meet would have a chilling effect on anonymous posting, thus violating potential posters from exercising their constitutional right to speak anonymously.\(^{58}\) As a result, the court modified the "Motion to Dismiss Standard" and settled on a two-part test.\(^{59}\) The plaintiff must first "to the extent reasonably practicable under the

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\(^{50}\) Lewis, *supra* note 38, at 955 (citing *Dendrite*, 775 A.2d at 760).


\(^{52}\) *CMLP, supra* note 45.

\(^{53}\) *Cahill*, *supra* note 15, at 722.

\(^{54}\) \(\text{id.}\) at 454.

\(^{55}\) \(\text{id.}\) at 455.

\(^{56}\) \(\text{id.}\) at 459.

\(^{57}\) \(\text{id.}\) at 460–61.
circumstance . . . undertake efforts to notify the anonymous poster that he is the subject of a subpoena or application for order of disclosure." The court also required that the plaintiff "post a message notifying the anonymous defendant of the plaintiff's discovery request on the same message board where the allegedly defamatory statement was originally posted." After satisfying these notification provisions, the plaintiff must then support his claim with sufficient facts to defeat a motion for summary judgment.

Although the court adopted two prongs of the Dendrite four-part "Motion to Dismiss Standard," it expressly rejected the other two prongs. In rejecting the second prong—requiring the plaintiff to set forth the exact defamatory statements—the Delaware court noted that this would be "subsumed in the summary judgment inquiry." In rejecting Dendrite's fourth requirement—that the trial court balance the defendant's First Amendment rights—the Delaware court also concluded that this is subsumed in the summary judgment inquiry. The Court commented that the balancing called for in the fourth prong would add no other protection "above and beyond that of the summary judgment test and needlessly complicates the analysis." This standard also has been widely accepted among various courts. This is considered a high-burden test for the plaintiff to meet because the plaintiff must "bring forward a substantial amount of evidence to support the underlying legal claim."

c. The Good Faith Basis Standard

Prior to Dendrite and Cahill, the Virginia Circuit Court, in In re Subpoena Duces Tecum to American Online, Inc., established the "Good Faith Basis Standard." This standard, however, "has not gained much traction in other courts." In that case, a Virginia court was asked to decide whether an OSP,

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60 Cahill, 884 A.2d at 460.
61 Id. at 461.
62 Id. at 460.
63 Id.
64 Id. at 461.
65 Id.
66 Cahill, 884 A.2d at 461.
68 CMLP, supra note 45.
69 CMLP, supra note 45.
71 Lewis, supra note 38, at 956; "The Delaware Supreme Court overturned the superior court's decision adopting the good faith standard and holding that Doe's identity should be revealed." Cahill, 884 A.2d at 455.
America Online ("AOL"), should reveal the identity of five John Does that allegedly made defamatory statements in an AOL chat room. The plaintiff served AOL with a discovery subpoena, and AOL sought to quash the subpoena on First Amendment grounds. The court ordered the unmasking of the anonymous defendants because the subpoena "does not unduly burden the First Amendment rights of the John Does." 

In ordering the unmasking, the court announced and applied a three-part test that plaintiffs must satisfy before the court will order OSP to reveal the identity of an anonymous defendant. The test is satisfied when: (1) the court is satisfied by the pleadings or evidence presented; (2) that "the party requesting the subpoena has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed;" and (3) the defendant's identity is necessary for the plaintiff to advance the claim.

One commentator noted that the language of this test allows for unmasking of an anonymous blogger without the plaintiff bringing forward evidence to support each element of his underlying claim. As a result, this test is generally considered to be a low-burden test.

d. Other Factors Considered By Courts

Although these three standards represent what a number of courts apply, they are not the only standards used. Over the past decade, courts have adopted at least seven different standards to evaluate John Doe subpoenas. These various tests share several common factors, including:

(1) ensuring the defendant has notice and opportunity to respond to the subpoena before his identity is exposed,

(2) evaluating the strength of the plaintiff's case,

(3) determining the relevance of the information sought by subpoena to the plaintiff's claim,

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73 Id.
74 Id. at *8.
75 Id.
76 Id.
77 Id. at *8.
78 CMLP, supra note 45.
79 Id. A low-burden test generally allows for the unmasking of an anonymous blogger without the plaintiff bringing forward evidence to support each element of his underlying legal claim. Id.
81 Gleicher, supra note 29, at 337.
(4) balancing the interests of the plaintiff and defendant,

(5) requiring that the plaintiff make his claim and demonstrate his evidence with specificity, and

(6) requiring that the plaintiff exhaust all alternatives for identifying the plaintiff before turning to a John Doe subpoena.\(^8\)

Courts developed the first four factors between 1999 and 2001.\(^8\) These early factors "describe a pattern of experimentation by courts centering around fairly weak protection for the anonymity of online speakers."\(^8\) The next three factors, all developed after 2001, demand a stronger showing by the plaintiff, thus suggesting a greater recognition by courts of the unusual constitutional challenges posed by John Doe subpoenas.\(^\) This is consistent with the recent and growing trend in anonymity cases for courts to apply a high-burden test.\(^8\)

B. OSPs' Obligations to Anonymous Bloggers

Next, it is important to examine what obligations, if any, an OSP has to its users. Generally, this section discusses whether an OSP has standing to oppose a subpoena on the grounds of the blogger's First Amendment rights and what type notification an OSP must provide to the blogger who is the subject of the subpoena.

1. Standing to Challenge Subpoenas

Although there is currently little case law regarding whether an OSP has standing to challenge John Doe subpoenas, the majority of courts that have addressed the issue have concluded that OSPs and other website hosts may assert the rights of their anonymous posters under the principle of \textit{jus tertii} standing.\(^8\) \textit{Jus tertii} standing is generally defined as "the right of a third party."\(^8\) 

\textit{Powers v. Ohio} is the leading case examining this principle. In \textit{Powers}, the United States Supreme Court announced a three-prong test to determine when someone may assert the rights of a third party.\(^8\) This test requires that the challenger establish that (1) the litigant suffered an injury in fact, (2) the litiga-
have a close relation to the third party, and (3) there is some hindrance to the third party’s ability to protect her own interest.90

What exactly is required is to establish a “close relationship” when OSPs are involved, however, is still unclear. As one commentator noted, “While some decisions appear to require that the recipient risk financial loss or demonstrate a ‘close relationship’ with the speaker, others do not.”91 For example, in In re Verizon Internet Services, Inc., the court found third-party standing because the OSP could lose business if it were not allowed to assert the rights of its subscribers.92 Here, the Recording Industry Association of America (“RIAA”) sought the identity of anonymous users who they believed violated copyright laws by offering hundreds of songs for free download over the Internet.93 Verizon, on behalf of its users, sought to quash the subpoena, contending that the First Amendment protected the users’ identities.94 The court ultimately denied the motion to quash.95

But before addressing the merits of the motion to quash, the court evaluated whether Verizon had standing to assert the First Amendment rights of its users.96 The court concluded that Verizon had standing, explaining that the relationship between Verizon and its subscribers is the type of relationship that will ensure that issues will be presented concretely and sharply.97 The court also found that Verizon has a “vested interest in vigorously protecting its subscribers’ First Amendment rights, because a failure to do so could affect Verizon’s ability to maintain and broaden its client base.”98 The court then went on to cite cases where the United States Supreme Court has recognized third-party standing in “similar business/client relationships.”99

Another example of an OSP having standing on behalf of its users is in Enterline v. Pocono Medical Center.100 In that case, a federal district court allowed a newspaper to assert the First Amendment rights of anonymous posters to its website because it had a close relationship with its posters.101 Here, Bren-

90 Id.
93 Id. at 246.
94 Id. Verizon also challenged the subpoena on the grounds that binding the users in absence of a case or controversy violates the court’s Article III powers. Id. at 246–47.
95 Id.
96 Id. at 257–58.
97 Verizon, 257 F. Supp. 2d at 258.
98 Id.
99 Id.
101 Id. at *3.
da Enterline filed a lawsuit against the Pocono Medical Center alleging she was subjected to sexual harassment and was retaliated against after complaining about the harassment. The Pocono Record ("the Newspaper") published an article about the lawsuit, and in response to the article, several people anonymously posted comments on the Newspaper's website claiming they had personal knowledge of the facts at issue in the case. Enterline served the Newspaper with a discovery subpoena seeking the identity of the anonymous posters. The Newspaper sought to quash this subpoena on behalf of the anonymous posters. The court found third-party standing for the Newspaper because "the relationship between [the Newspaper] and readers posting in the Newspaper's online forums is the type of relationship that allows [the Newspaper] to assert the First Amendment rights of the anonymous commentators." Based upon the limited case law, it appears that OSPs do have standing to challenge a subpoena based upon the user's First Amendment rights. Because OSPs have standing to challenge a subpoena on behalf of a third-party, the question becomes what duty does that OSP have to challenge a subpoena on behalf of a third-party?

2. OSPs' Duty to Provide Notice of a Subpoena to Its Users

Generally, the plaintiff has the duty to undertake efforts to notify the anonymous author about the subpoena and provide him or her with time to respond. This notification can take an untraditional form. For example, in Mobilisa, Inc. v. Doe, the court ordered the requesting party to "notify the anonymous party via the same medium used by the party to send or post" the alleged defamatory statement. The court gave the example that if the message was sent via email, "the requesting party must make the notification via a response to the email or separate email to the anonymous sender's address. Similarly, if the message at issue was posted to an Internet message board, the requesting party must take the notification via a posting to that same message board."

Although many courts impose this duty upon the plaintiff, some courts have held that the recipient of the subpoena, in this case the OSP, may also be

\(^{102}\) Id. at \*1.

\(^{103}\) Id.

\(^{104}\) Id.

\(^{105}\) Id.

\(^{106}\) Enterline, 2008 WL 5192386, at \*3.

\(^{107}\) See discussion infra Section III.

\(^{108}\) Protections, supra note 15, at 732.


\(^{110}\) Id. at 719–20.
obligated to provide notice to the anonymous poster. For example, in *UMG Recordings, Inc. v. Does 1–4*, the court ordered the subpoenaed company to give its subscribers a copy of the subpoena prior to releasing any personally identifiable information five days upon its receipt of the subpoena. The court reasoned that this notice was required in “the interest of fairness and pursuant to [Federal Rules of Civil Procedure] 45(c)(3)(A)(iii) and (iv), which provide that a subpoena may be quashed or modified if it requires disclosure of privileged or ‘other protected matter,’ or if it subjects a person to undue burden.” The court concluded that because of the privacy and First Amendment interests at stake, it had authority under the Federal Rules of Civil Procedure to condition the subpoena on notice and an opportunity to be heard by the anonymous poster.

Similarly, in *Mobilisa, Inc. v. Doe*, the trial court also ordered the OSP to notify the anonymous poster of the pending proceedings when the plaintiff attempted, but failed, to contact the poster. The OSP appealed this decision. In upholding the trial court’s ruling, the appellate court reasoned that the trial court was within its inherent authority to place the burden on the OSP to notify the anonymous poster. The court did, however, note that if the OSP incurred costs in notifying the anonymous poster, the trial court could require the requesting party to pay that cost.

The court in *Solers, Inc. v. Doe* also took a similar approach. In that case, an anonymous person filed an online complaint to the Software & Information Industry Association ("SIIA") claiming that Solers was using unlicensed software. The SIIA investigated the report, but closed the file without taking any further action. After the file was closed, Solers then filed a complaint against the anonymous person, claiming defamation and tortious interference with "advantageous business opportunities." Solers issued a subpoena to

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112 2006 WL 1343597, at *3.
113 Id.
114 Id.
115 170 P.3d at 721.
116 Id.
117 Id.
118 Id.
119 977 A.2d 941, 945 (D.C. 2009).
120 Id.
121 Id. SIIA claims it closed its file not because the allegations were false, but because it wanted to protect the identity of the anonymous reporter. Id.
122 Id. at 946.
SIIA, and SIIA moved to quash. SIIA, on its own initiative, notified John Doe of the subpoena.

Nonetheless, in reviewing the trial court's decision to quash the subpoena, the appellate court discussed who is required to notify John Doe of the subpoena. The court acknowledged that many jurisdictions require the plaintiff to notify the defendant, usually by the same manner in which the defamatory remark was posted. The court explained, however, that "[n]evertheless, it often will be simpler and more effective to require the recipient of the subpoena (who likely knows the identity of the anonymous defendant, or at least knows how to contact him) to provide such notice." Instead of a blanket requirement that the recipient must notify John Doe of the subpoena, the court left it up to the trial court "to determine in the circumstances of each case who should notify the anonymous defendant . . . ."

Although the majority of the notification requirements are being created judicially, at least one state has codified certain notification requirements in civil cases regarding subpoenas to identify anonymous posters. This Virginia statute requires the person seeking identification of the anonymous poster, inter alia, to show "[t]hat other reasonable efforts to identify the anonymous communicator have proven fruitless." The statute then requires the recipient of the subpoena to notify the subject of the subpoena via e-mail and to forward a copy of the subpoena through certified mail or a commercial delivery service.

In addition to the Virginia statute, a federal law exists requiring that cable operators must notify a subscriber before disclosing personally identifiable information in response to a court order. In the context of this statute, a cable operator includes an OSP using cable modems.

C. **OSP Liability to a Defamed Plaintiff**

In addition to constitutional concerns and an OSP's general obligations to users, it is also important to discuss any potential liability an OSP may have to defamed plaintiffs. Traditionally, the defamation plaintiff can sue both the

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123 *Id.*
124 *Id.* at 946, 955.
125 *Solers*, 977 A.2d at 954.
126 *Id.*
127 *Id.*
128 *Id.* at 955.
130 *Id.* at § 401.1(A)(1)(b).
131 *Id.* at § 401.1(A)(3).
133 *Protections*, supra note 15, at 725, n.73.
author and the primary publishers\textsuperscript{134} of the libelous statement.\textsuperscript{135} When statements are made through the Internet or on a person’s blog, the OSP would potentially be considered the publisher.\textsuperscript{136}

Congress, however, through the Communications Decency Act of 1996\textsuperscript{137} ("CDA"), has closed off this potential avenue of recovery for plaintiffs.\textsuperscript{138} Section 230 of the CDA provides that no OSP "shall be treated as the publisher or speaker of any information provided by another."\textsuperscript{139} This means that Internet service providers, website operators, and forum moderators are not publishers for the purposes of defamation actions.\textsuperscript{140} Despite this statutory proclamation, in some jurisdictions, an OSP may still be held liable to a defamed plaintiff as a minority of courts have held that an OSP may be liable when the OSP is the "distributor," as opposed to the "publisher," of third-party content.\textsuperscript{141}

Traditionally, the distributor of third-party material can be subject to civil liability if the distributor had knowledge or reason to know that the content of the material was defamatory.\textsuperscript{142} Despite this traditional understanding, a majority of courts have held that the CDA extends immunity to OSPs as distributors.\textsuperscript{143} For example, in Zeran v. America Online, an unidentified person posted a message on an AOL bulletin board selling shirts "featuring offensive and tasteless slogans related" to the Oklahoma City bombing.\textsuperscript{144} The message directed those interested to call "Ken" at Zeran’s home number.\textsuperscript{145} As a result of this prank, Zeran received a high volume of calls, mainly consisting of angry and derogatory messages, including some death threats.\textsuperscript{146} Zeran contacted AOL to remove the message and a representative assured him that the message would be removed. AOL, however, would not print a retraction as it is against the corporation’s policy.\textsuperscript{147}

\textsuperscript{134} A plaintiff can also seek to sue the distributor of a defamatory remark. However, a majority of courts have interpreted the Communications Decency Act to apply broadly to distributors of defamatory speech in the Internet context. See discussion infra Section § II.B.3 for further explanation.

\textsuperscript{135} Lewis, supra note 38, at 952.

\textsuperscript{136} Id.


\textsuperscript{138} See Lewis, supra note 38, at 959.

\textsuperscript{139} 47 U.S.C. § 230(c)(1).

\textsuperscript{140} See STUCKEY, supra note 14, at §2.03[2].

\textsuperscript{141} See Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008).

\textsuperscript{142} STUCKEY, supra note 14, at §2.03.

\textsuperscript{143} See, e.g., Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997).

\textsuperscript{144} Id. at 329.

\textsuperscript{145} Id.

\textsuperscript{146} Id.

\textsuperscript{147} Id.
Zeran filed suit against AOL.\textsuperscript{148} AOL responded that the CDA granted it immunity from the suit and filed a motion to dismiss on the pleadings.\textsuperscript{149} The district court agreed.\textsuperscript{150} On appeal, the United States Court of Appeals for the Fourth Circuit agreed with the district court and held that AOL was immune from liability.\textsuperscript{151} After reviewing the purpose of the CDA, the court reasoned that “Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.”\textsuperscript{152} As a result, the court concluded that distributor liability “is merely a subset, or a species, of publisher liability, and is therefore also foreclosed” by the CDA.\textsuperscript{153}

Similarly, in \textit{Blumenthal v. Drudge}, the publisher immunity exception of the CDA was expanded to include OSP immunity from suit even when the defamatory content is licensed for use by the OSP.\textsuperscript{154} Here, the \textit{Drudge Report}, an online Internet gossip column,\textsuperscript{155} posted a story alleging that Sid Blumenthal, an incoming assistant to the President, had a history of domestic violence.\textsuperscript{156} The next day, the story was retracted and the \textit{Drudge Report} issued a public apology.\textsuperscript{157} The Blumenthals, however, sued \textit{Drudge} and AOL, the OSP for \textit{Drudge} and one of its business partners.\textsuperscript{158} Although the district court conceded that AOL would certainly be considered a distributor under common law,\textsuperscript{159} the court ultimately concluded that the CDA prohibits liability for an OSP.\textsuperscript{160} The court explained that “[i]n some sort of tacit \textit{quid pro quo} arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to [OSPs] to self-polic[e] the Internet for . . . offensive material, even where the self-policing is unsuccessful or not even attempted.”\textsuperscript{161}

Next, in \textit{Ben Ezra, Weinstein & Co. v. America Online, Inc.}, the United States Court of Appeals for the Tenth Circuit expanded OSP immunity to an

\begin{flushleft}
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\textsuperscript{148} \textit{Id.}
\textsuperscript{149} Zeran, 129 F.3d at 329.
\textsuperscript{150} \textit{Id.} at 330.
\textsuperscript{151} \textit{Id.} at 335.
\textsuperscript{152} \textit{Id.} at 330–31.
\textsuperscript{153} \textit{Id.} at 332.
\textsuperscript{156} \textit{Blumenthal}, 992 F. Supp. at 46.
\textsuperscript{157} \textit{Id.} at 48.
\textsuperscript{158} \textit{Id.} at 46.
\textsuperscript{159} \textit{Id.} at 51 (“It would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied to a distributor.”).
\textsuperscript{160} \textit{Id.} at 52.
\textsuperscript{161} \textit{Id.}
\end{flushleft}
OSP that took an active part in the developing of the false statements.\footnote{206 F.3d 980, 983 (10th Cir. 2000); Trende, supra note 155, at 628.} Here, AOL provided stock quotation information that was continuously updated throughout the day.\footnote{\textit{Ben Ezra}, 206 F.3d at 983.} Two independent third parties provided the information to AOL; however, AOL would sometimes delete or edit that information.\footnote{\textit{Id.} at 985–86.} The Plaintiffs argued that this editing rendered AOL both an interactive computer service and an information content provider.\footnote{\textit{Id.} at 985.}

The Tenth Circuit disagreed and held that “Plaintiff has not demonstrated [AOL] worked so closely with ComStock and Townsend regarding the allegedly inaccurate stock information that [AOL] became an information content provider.”\footnote{\textit{Id.} \textit{at} 985.} The court reasoned that “[b]y deleting symbols, however, [AOL] simply made the data unavailable and did not develop or create the stock quotation information displayed.”\footnote{\textit{Id.}} Although the CDA defines an information content provider as “any person or entity that is responsible, in whole or in part, for the creation or development of information,” the court found that AOL was not such a provider.\footnote{\textit{Id.}}

The majority of courts have followed the \textit{Zaran-Blumenthal-Ben Ezra} line of cases finding the OSP immune from defamation actions because they fall within the publisher exception of the CDA; however, a minority of courts have not. For example, in \textit{Chicago Lawyers’ Committee for Civil Rights Under Law, Inc., v. Craigslist, Inc.}, a public interest consortium brought suit against \textit{Craigslist} for allegedly violating the Fair Housing Act by posting notices that advertised housing by indicating preference, limitation, or discrimination based on race, religion, sex, or family status.\footnote{\textit{Craigslist}, 519 F.3d 666, 668 (7th Cir. 2008).} The district court granted \textit{Craigslist’s} motion for judgment on the pleadings.\footnote{\textit{Id.} at 666.} Although an appellate court affirmed the dismissal, it rejected that the CDA provides broad immunity, concluding that the CDA is not a “general prohibition of civil liability for web-site operators and other online content hosts.”\footnote{\textit{Id.}} The court reasoned that the United States Supreme Court’s opinion in \textit{Metro-Goldwyn-Mayer Studios v. Grokster}, holding that “‘information content providers’ may be liable for contributory infringement if their system is designed to help people steal music or other material in
copyright."\textsuperscript{172} is “incompatible with treating § 230(c)(1) as a grant of comprehensive immunity from civil liability for content provided by a third party.”\textsuperscript{173}

Similarly, in \textit{Fair Housing Council of San Fernando v. Roommates.com, LLC.}, a local fair housing council brought an action against \textit{Roommates.com} for violating the Fair Housing Act.\textsuperscript{174} Before subscribers on \textit{Roommates.com} can search listings or post housing opportunities, “they must create profiles, a process that requires them to answer a series of questions.”\textsuperscript{175} The housing council alleges that the website is effectively acting as a “housing broker doing online what it may not lawfully do off-line.”\textsuperscript{176} The district court granted the defendant’s motion for summary judgment, reasoning that the CDA bars this claim.\textsuperscript{177}

The appellate court reversed the lower court’s decision, concluding that the CDA did not provide immunity to the website because “[t]he CDA does not grant immunity for inducing third parties to express illegal preferences. Roommate’s own acts—posting the questionnaire and requiring answers to it—are entirely its doing and thus section 230 of the CDA does not apply to them.”\textsuperscript{178} As a result, the court concluded that \textit{Roommates.com} is a developer “[a]nd section 230 provides immunity only if the interactive computer service does not ‘creat[e] or develop[ ]’ the information ‘in whole or in part.’”\textsuperscript{179}

When dealing with CDA immunity issues, the court, however, was cognizant of the fact that “there will always be close cases . . .”\textsuperscript{180} The court limited its holding to cases “[w]here it is very clear that the website directly participates in developing the alleged illegality . . .”\textsuperscript{181} For example, the court explained that websites involving “generic text prompt with no direct encouragement to perform illegal searches or to publish illegal content” will still be immune.\textsuperscript{182} The court summed up its holding: “If you don’t encourage illegal content, or design your website to require users to input illegal content, you will be immune.”\textsuperscript{183}

Many commentators believe that the majority position of OSP immunity from defamation actions under the publisher exception to the CDA is an incor-

\textsuperscript{172} \textit{Id}. at 670 (citing Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005)).

\textsuperscript{173} \textit{Id}

\textsuperscript{174} 521 F.3d 1157, 1162 (9th Cir. 2008).

\textsuperscript{175} \textit{Id}. at 1161.

\textsuperscript{176} \textit{Id}. at 1162.

\textsuperscript{177} \textit{Id}

\textsuperscript{178} \textit{Id}. at 1165.

\textsuperscript{179} \textit{Id}. at 1166 (citing 47 U.S.C. § 230(f)(3)).

\textsuperscript{180} \textit{Roommates.com}, 521 F.3d at 1174.

\textsuperscript{181} \textit{Id}

\textsuperscript{182} \textit{Id}. at 1175.

\textsuperscript{183} \textit{Id}
rect interpretation of the CDA. 184 George Washington University Law Professor, Daniel Solove, a leading commentator on the Internet and privacy, believes the CDA should be read to grant immunity only until the OSP is informed of defamatory speech on its Website. 185 Once the OSP is informed of the potentially problematic speech, if the OSP does nothing about the speech, that act would constitute an implicit endorsement of the comment for which the OSP could be held liable. 186 Similarly, another commentator, Cara Ottenweller, believes Congress should amend the CDA to emphasize protection from publisher liability only, which would "put an end to the dangerous blanket immunity that recent judicial interpretation has unwisely crafted."

Furthermore, any amendment would also include an explicit provision that an OSP would not be immune from distributor liability if the OSP has notice of the objectionable materials and fails to take remedial action. 188

While the majority of courts hold an OSP immune from defamation actions because they fall within the publisher exception of the CDA, a minority of courts, and a number of commentators believe the CDA does not provide for the broad immunity called for by the majority. As it stands now, however, the Zeran-Blumenthal-Ben Ezra line of cases stands as the majority position.

D. Anonymous Poster’s Recourse Against “Defamed” Plaintiff: Anti-SLAPP Laws

Recall that the right to speak anonymously has been extended by many courts into cyberspace. However, like most rights, this is not absolute. Three main tests have emerged with respect to unmasking an anonymous blogger: “The Motion to Dismiss Standard,” “The Summary Judgment Standard,” and “The Good Faith Basis Standard.” With this growing body of law allowing for the discovery of an anonymous poster’s identity, many are concerned that some plaintiffs, specifically companies, will use discovery subpoenas as “weapons” against people who speak out on the Internet. 189 As a result, the term “cyber-SLAPP” has emerged.

A “cyberSLAPP” is an attempt to “silence . . . anonymous critics on the [chat] boards and intimidate other Internet users to keep their criticisms to them-

184 See Lewis, supra note 38, at 960.
186 Id.
188 Id.
189 Robert D. Richards, Sex, Lies, and the Internet: Balancing First Amendment Interests, Reputational Harm, and Privacy in the Age of Blogs and Social Networking Sites, 8 FIRST AMEND. L. REV. 176, 204 (2009).
At least twenty-nine states, however, have dealt with the issue of “cyberSLAPPs” by either statute or through case law. These states allow the victim of the “cyberSLAPPs” to “defend the lawsuit under their state’s anti-SLAPP law.” Anti-SLAPP laws are “typically designed to bring about a quick disposition of the case believed to be a SLAPP, immunize the comments of the citizens who have spoken out and allow for attorneys fees and costs if the court determines that the lawsuit was filed for a nefarious purpose.” Most importantly though, “these laws often require that discovery [of the anonymous poster] be stayed while the court considers [whether] to strike the lawsuit.”

When the blogger’s anonymity is removed, the exposure of the blogger’s identity can result in intimidation, harassment, and possible “retaliation by either the instigator of the lawsuit or the speaker’s peers.” Because of these potential negative results of having the identity revealed, removal of a blogger’s anonymity will result in chilling speech. In order to balance the right of a plaintiff to recover from allegedly defamatory remarks and the right of defendants from being subject to SLAPP suits, most anti-SLAPP laws require the plaintiff to make “an evidentiary showing to avoid dismissal.” For example, California’s anti-SLAPP statute requires a showing that there is a “probability that he or she will prevail on the claim.” Therefore, much like all other aspects of anonymous blogging and defamation, when a court is faced with a potential SLAPP suit, the court must balance the constitutional rights of the anonymous blogger with the rights of the plaintiff to seek recovery for defamatory remarks.

III. ANALYSIS: DOES AN OSP OWE A FIDUCIARY DUTY TO ITS USERS?

Recall in the “Skanks in NYC” case that Google, as a matter of policy, would not reveal the identity of its user without a court order and that court order was later granted. What did Google do then to prevent the issuance of the court order? Google objected to the subpoena, but it “merely object[ed] that
petitioner's request for relief [was] overbroad, vague and ambiguously worded, and unduly burdensome." 200  Google did not aggressively challenge the subpoena outside of this formulaic motion. 201  Because Google did not aggressively challenge the subpoena, the anonymous blogger discussed bringing suit against Google alleging a breach of fiduciary duty. 202

This analysis section discusses the arguments for and against a finding that an OSP has a fiduciary duty to its users. First, this section will provide an update on the cases where the plaintiff has sought to unmask an anonymous blogger. This section will then examine when a fiduciary duty exists. Next, this section considers whether an OSP can be considered a fiduciary as well as addressing the counter arguments to considering an OSP as a fiduciary. Finally, this section concludes with two recommendations on how OSPs can avoid the formation of a fiduciary relationship.

A. Other Cases Seeking to Unmask an Anonymous Blogger

In October 2010, Google again was ordered to turn over the identity and contact information of an anonymous commenter. 203  Carla Franklin, a business consultant, sued Google over a video and comments posted on YouTube. 204  The video contained personal information, while the comments contained sexual slurs. 205  After filing suit, Google was ordered to provide the contact information of those posting the denigrating comments and videos. 206  Moreover, in July of 2010, a North Carolina trial court judge ordered the editor of a local community blog to turn over the identities of six anonymous commentators who allegedly defamed a local politician. 207  Applying essentially the "Motion to Dismiss Standard," the Court found that six out of the twenty anonymous comments were actionable, thus ordering the OSP to turn over their identities. 208  As these two cases illustrate, as blogging and other Internet commentary become prevalent, courts will be forced to address the tension between protecting the constitu-

201 See id.
202 See discussion supra Section I.
204 Id.
205 Id.
206 Id.
208 See id.
tional right to blog anonymously with an allegedly defamed person’s interest in proceeding with his or her case.

B. When Does a Fiduciary Duty Exist?

“Fiduciary law is messy... [T]he prevailing view remains that fiduciary law is ‘elusive.’”209 Many relationships are treated as fiduciary simply because it is a function of the relationship rather than the quality of the particular relationship.210 These types of relationships typically include “attorney-client, corporate director-shareholders, trustee-beneficiary, managing partner-partner, agent-principal, employee-employer, guardian-ward, and physician-patient.”211 There are, however, “a few relatively uncontroversial propositions about the concept upon which almost all could agree.”212 The uncontroversial factors that courts use to determine whether a fiduciary relationship exists include: relationships of trust, expertise in the interaction at issue, greater control over assets, and a high degree of influence over a beneficiary’s decision-making process.213

No courts have yet addressed whether a fiduciary relationship exists between an OSP and a user. At least one court, however, has found that a fiduciary relationship exists when confidential information, among other things, is exchanged between parties.214 In *Anonymous v. CVS Corporation*, a New York trial court found a fiduciary relationship existed between a customer and a pharmacist.215 Here, CVS Corporation purchased a local pharmacy and its prescription records.216 Plaintiff, who was diagnosed with HIV and AIDS, brought a suit against the local pharmacy and CVS claiming the local pharmacy breached its fiduciary duty of confidentiality by sharing the prescription records with CVS and that CVS aided and induced this breach.217 CVS and the local pharmacy asserted that no fiduciary duty of confidentiality existed, and if it did,

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211 *Id.*
212 *Id.* at 682.
213 *Id.*
215 *Id.*
216 *Id.* at 335.
217 *Id.* at 335–36.
they did not breach it when transferring the records to another pharmacist. \textsuperscript{218} The court disagreed. \textsuperscript{219}

In finding that a fiduciary duty existed between the pharmacy and plaintiff, the court first reasoned that a fiduciary duty exists "where one party reposed trust and confidence in another who exercises discretionary functions for the party’s benefit or possesses superior expertise on which the party relied." \textsuperscript{220} The court then determined that pharmacists, unlike parties to traditional commercial transactions, are required to collect confidential medical information. \textsuperscript{221} Although communicating confidential information alone is not enough to create a fiduciary relationship, the court also found that customers relied on the pharmacist for drug advice. \textsuperscript{222} In sum, because the pharmacist had a "superior knowledge of pharmaceuticals," the customer placed a degree of trust and confidence in the pharmacist's superior knowledge, and the customer gave his confidential information to the pharmacist, a fiduciary relationship was created. \textsuperscript{223}

Applying these principles, a discussion of the arguments for and against the establishment of a fiduciary relationship between a user and an OSP follows.

\textbf{C. Argument: An OSP Is a Fiduciary}

\textbf{1. CVS Corporation Analysis}

Looking first at the analysis in \textit{CVS Corporation}, in order to create the fiduciary relationship between an OSP and a user, it would have to be shown that the user reposes trust and confidence in the OSP, who, in return, exercises discretionary functions for the user’s benefit or the user relies on the OSP’s superior expertise. \textsuperscript{224} \textit{Blogger.com}'s Terms of Service provide that “Google claims no ownership or control over any Content submitted, posted or displayed by you on or through Google services.” \textsuperscript{225} Furthermore, \textit{Blogger.com} allows for the user to setup the blog by choosing a template and customizing the blog’s design. \textsuperscript{226} Clearly, the setup is at the discretion of the user, but the analysis does not stop there.

\textsuperscript{218} \textit{Id.} at 336.
\textsuperscript{219} \textit{Id.} at 337.
\textsuperscript{220} \textit{CVS Corp.}, 728 N.Y.S.2d at 337.
\textsuperscript{221} \textit{Id.}
\textsuperscript{222} \textit{Id.}
\textsuperscript{223} \textit{Id.} at 338.
\textsuperscript{224} See discussion supra Section III.B.
\textsuperscript{225} \textit{Blogger Terms of Service}, BLOGGER.COM, ¶ 6, http://www.blogger.com/terms.g (last visited March 1, 2011) [hereinafter \textit{Blogger Terms}].
\textsuperscript{226} \textit{Blogger Features}, BLOGGER.COM, http://www.blogger.com/features (last visited March 1, 2011) [hereinafter \textit{Blogger Features}].
In setting up the blog, however, the user is relying on the superior expertise of the OSP. Creating a website from scratch can be very hard.\textsuperscript{227} Sites like Blogger.com provide the user with predesigned templates, where the blogger can easily change the fonts, text color, and alignment.\textsuperscript{228} Essentially, these sites allow you to "[c]reat[e] your blog . . . [in] just a few easy steps."\textsuperscript{229} Thus, an argument can be made that users are relying on the superior expertise of the OSP in order to create a blog.

Moreover, the user, by accessing this service, is reposing trust and confidence in the site. As Google itself acknowledges, these sites "are keenly aware of the trust . . . [the] users place in [the OSP]."\textsuperscript{230} This is especially true when it comes to privacy matters. For example, Google has established five principles that outline their privacy objectives.\textsuperscript{231} Similarly, another prominent blog site, Wordpress.com, has established four key principles of privacy.\textsuperscript{232} In accordance with the privacy principles, both of these sites will not share personal information with anyone unless it must do so to comply with the law or to develop their products, which includes sharing it with their subsidiaries.\textsuperscript{233} Thus, an argument can be made that the user has reposed trust and confidence in the OSP by providing it with confidential identity information. Under the CVS Corporation analysis, because the user reposes trust and confidence in the OSP and relies upon the superior expertise of the OSP in order to create a blog, a fiduciary duty is created between the OSP and the user.

2. Principal/Agent Relationship

The other legal arena where a fiduciary duty could be created between an OSP and a user is in terms of agency law. A principal/agent relationship is created when "one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the prin-
principal’s control, and the agent manifests assent or otherwise consents so to act.\textsuperscript{234} In terms of the relationship between the user and the OSP, the user, acting as the principal, chooses the OSP, or the agent, to host its webpage.\textsuperscript{235}

This agent can, however, “act independently to prevent the principal’s misconduct.”\textsuperscript{236} Although, Blogger.com believes “that censoring this content is contrary to a service that bases itself on freedom of expression,”\textsuperscript{237} Blogger.com created content boundaries to “both comply with legal requirements and that serve to enhance the service as a whole.”\textsuperscript{238} If the blog violates the content policy, Blogger.com will take a number of actions, including putting the blog behind an interstitial where only the blog author can access the content or deleting the blog.\textsuperscript{239}

Assuming a principal/agent relationship is created, in order for fiduciary duties to attach, there must be an element of confidentiality. The existence of a principal/agent relationship alone does not give rise to a fiduciary relationship.\textsuperscript{240} A fiduciary relationship between the principal and the agent will arise when the principal relies upon the agent to protect the principal’s confidential information.\textsuperscript{241} This is especially true when the agent has particular knowledge.\textsuperscript{242} For example, “if an employee in the course of his employment acquires secret information relating to his employer’s business, he occupies a position of trust and confidence toward it, and must govern his actions accordingly.”\textsuperscript{243} An agent generally has a duty to protect the principal’s confidential information.\textsuperscript{244}

A blogger may be able to show that confidential information was provided to and protected by the OSP, which serves as the blogger’s agent. Assuming the blogger wishes to blog anonymously, the blogger’s real name or any way to identify the blogger (such as an IP address) becomes confidential.\textsuperscript{245} Not only is this confidential, but the right to blog anonymously is generally constitu-

\textsuperscript{234} Restatement (Third) of Agency § 1.01 (2006).


\textsuperscript{236} See id.

\textsuperscript{237} Blogger Content Policy, BLOGGER.COM, http://www.blogger.com/content.g (last visited March 1, 2011) [hereinafter Blogger Content].

\textsuperscript{238} Id.

\textsuperscript{239} Id.


\textsuperscript{242} Metro Ambulance, 1995 WL 409015, at *3.


\textsuperscript{244} Restatement (Second) of Agency § 395 (1958).

\textsuperscript{245} See, e.g., Automattic Privacy, supra note 232 ("We don’t share your personal information with anyone . . . . ").
tionally protected.\textsuperscript{246} When the user signs up for the website,\textsuperscript{247} the OSP voluntarily takes on the obligation to keep this information confidential. For example, the Wordpress.com privacy page states that it doesn’t “share your personal information with anyone.”\textsuperscript{248} Moreover, as discussed previously, these blog sites take the privacy of their users very seriously.\textsuperscript{249} Thus, an argument can be made that a fiduciary relationship between an OSP and user can arise under a principal/agent relationship.

3. Breaching the Fiduciary Duty

Once a fiduciary relationship is established, it is possible that a breach of that duty can be demonstrated if the fiduciary does not seek to quash a discovery subpoena.\textsuperscript{250} For example, in \textit{Inghram v. Mutual of Omaha Insurance Company}, a district court in Missouri held that Mutual of Omaha breached its fiduciary duty by not pursuing a motion to quash a discovery subpoena.\textsuperscript{251} Here, the plaintiff was set to be a “witness in an unrelated case entitled \textit{Walton v. American Delivery Service}.”\textsuperscript{252} The defense attorney in the Walton case subpoenaed Inghram’s medical records from Mutual of Omaha, Inghram’s medical insurance carrier.\textsuperscript{253} Mutual of Omaha mailed the medical records to the defense attorney without obtaining consent by Inghram or challenging the subpoena.\textsuperscript{254} Plaintiff then brought suit against Mutual of Omaha for breach of fiduciary duty and breach of the physician-patient privilege.\textsuperscript{255}

The court first found a fiduciary relationship between the insurance company and the insured.\textsuperscript{256} After establishing this relationship the court noted that Mutual of Omaha could have pursued several options to protect the confidentiality of Inghram’s medical records.\textsuperscript{257} These options include: filing objections with the defense attorney, filing a motion to quash, or seeking a protective order before disclosing the records.\textsuperscript{258} The court found, because Mutual of

\begin{thebibliography}{99}
\bibitem{footnote1} See discussion supra Section II.A.1.
\bibitem{footnote2} See, e.g., Google Privacy Policy, supra note 233 ("When you sign up . . . , we ask you for personal information [such as your name].").
\bibitem{footnote3} Automattic Privacy, supra note 232.
\bibitem{footnote4} See discussion supra Section III.B.
\bibitem{footnote6} \textit{Id.} at 912.
\bibitem{footnote7} \textit{Id.} at 908.
\bibitem{footnote8} \textit{Id.}
\bibitem{footnote9} \textit{Id.}
\bibitem{footnote10} \textit{Id.} at 909.
\bibitem{footnote11} Inghram, 170 F. Supp. 2d at 911.
\bibitem{footnote12} \textit{Id.}
\bibitem{footnote13} \textit{Id.}
\end{thebibliography}
Omaha did not seek any of these options, nor did it seek consent from Inghram, Mutual of Omaha breached its fiduciary duty.\textsuperscript{259}

Although \textit{Inghram} involved an insurance agency and an insured person, an expansion of this principle to the realm of OSP and user would not be a far stretch. Although the OSP is not the holder of medical information about the user, the OSP is the holder of something that many would consider just as important—the anonymous user’s identity. To put this into context, in Rosemary Port’s situation (the author of “Skanks in NYC”), assume the court found a fiduciary relationship, then under \textit{Inghram}, Google would have been required to aggressively challenge the subpoena in order to uphold the fiduciary relationship.\textsuperscript{260} Instead, Google merely submitted a formulaic motion.\textsuperscript{261}

\textbf{D. Counter Arguments: An OSP Is Not a Fiduciary}

Although an argument can be made that a fiduciary relationship exists between an OSP and a user, an equally persuasive, if not stronger, argument can be made that no such relationship exists. Looking first at the test set forth in\textit{CVS Corporation}, an OSP’s superior expertise can be questioned. Although it may be hard to create a complex website or blog, with a simple Google search, a novice can find a multitude of instructions on how to create a website for free and part with the services provided by an OSP.\textsuperscript{262} Unlike a pharmacist, the expertise necessary to create a website or blog can be gained in a matter of days, as opposed to a number of years.

In terms of arguing against a principal/agent relationship, this relationship is formed when “one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”\textsuperscript{263} Here, the OSP, the proposed agent, is not subject to control of the proposed principal, the user. Looking at the \textit{Blogger.com} Terms of Service, it is clear that \textit{Blogger.com} is not subject to the control of the user.\textsuperscript{264} For example, “Google disclaims all responsibility and liability for the availability, timeliness, security or reliability of the Service.”\textsuperscript{265} Furthermore, the Terms of Service pro-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{259} \textit{Id.} at 912.
\item \textsuperscript{260} \textit{See id.} at 911.
\item \textsuperscript{262} This author did a Google search using “how to create a website from scratch for free.” This search netted numerous results, including a free “ebook” called \textit{HOW TO MAKE A WEBSITE FROM SCRATCH} (2001), \url{available at http://download.cnet.com/How-to-Make-a-Website-From-Scratch/3000-2124_4-10055643.html} (last visited February 15, 2010).
\item \textsuperscript{263} \textit{RESTATEMENT (THIRD) OF AGENCY} § 1.01 (2006).
\item \textsuperscript{264} \textit{See generally Blogger Terms, supra note 225.}
\item \textsuperscript{265} \textit{Id.}
\end{itemize}
\end{footnotesize}
vide that "Google may, in its sole discretion, at any time and for any reason, terminate the Service, terminate this Agreement, or suspend or terminate your account."²⁶⁶ Here, it appears the principal, who is the user, has no control over the agent. Because there is no control over the agent by the principal, there is a strong argument that a principal/agent relationship cannot be formed.

Because both CVS Corporation and the elements of a principal/agent relationship require some sort of confidentiality or trust in order for a fiduciary relationship to be formed, a single discussion of that element is sufficient. Although it is true that blog sites generally protect the privacy of others, this protection is not absolute. For example, Google shares the user’s personal information with its "subsidiaries, affiliated companies or other trusted businesses or persons for the purpose of processing personal information on our behalf."²⁶⁷ Similarly, Wordpress.com shares users' personal information with "contractors and affiliated organizations."²⁶⁸ These contractors and affiliated organizations "may be located outside of your home country."²⁶⁹ Thus, the blog site has not truly kept personal information confidential from other third parties.

Furthermore, assuming a contract with the user is created by the terms of service, such confidentiality agreements alone have been held to not create a fiduciary relationship.²⁷⁰ As one court noted, a fiduciary obligation is not "imposed simply because the parties to a contract reposed trust and confidence in each other."²⁷¹ Thus, although the OSP may contain a duty to generally keep the user’s identity confidential, this does not create a fiduciary duty.

E. How Can an OSP Avoid the Formation of a Fiduciary Relationship?

Although no court has found that a fiduciary relationship exists between an OSP and a mere user of its site, it is not outside the realm of possibilities that a court could find that such a relationship exists. As a result, an OSP may wish to take some preemptive steps to avoid any conclusions that a fiduciary duty had been created. First, OSPs should incorporate a statement in their terms of service that plainly disclaims any fiduciary obligations. As an example, such a statement may be: "The use of this website does not create any degree of trust between the user and the OSP" or "The use of this website does not create a fiduciary relationship between the user and this OSP." Although the finding of fiduciary liability "is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the rela-

²⁶⁶ Id.
²⁶⁷ Google Privacy Policy, supra note 233.
²⁶⁸ Automattic Privacy, supra note 232.
²⁶⁹ Id.
²⁷¹ Id. at 1049.
tion,"272 many courts are wary to create this relationship of higher trust in light of specific contractual provisions to the contrary.273 Thus, adding an express term disclaiming the existence of a fiduciary relationship would likely be treated as at least relevant, if not dispositive, of the issue.

Second, the OSP should consider outlining the procedures it will follow when it receives a subpoena seeking personal information of its user in its terms and conditions. For example, Cyberslapp.org has outlined a seven-point “Sample Privacy Provision on ‘Notice of Subpoenas’” that an OSP should include in its terms of service or privacy policy.274 The terms in this sample include provisions limiting an OSP’s obligations to simply notify the user of the subpoena, informing the user that he or she may be able to challenge the subpoena on First Amendment grounds, and further informing the user that he or she should seek independent legal consultation.275 Although a provision outlining the limited obligations of an OSP when it receives a subpoena may not preclude a finding by the court of a fiduciary relationship, as discussed supra, generally courts do not want to impose a higher relationship than that outlined in the parties’ contractual agreement.276

IV. Conclusion

The possibility of an OSP having a fiduciary relationship to its user is a question that courts will likely have to face in the near future. Currently, online anonymous speech is afforded constitutional protection. But, like most constitutional protections, it has its limits. In order to determine those limits, courts have developed a number of standards and factors to determine whether an anonymous blogger should be unmasked. Although OSPs have limited duties, such as notifying a user about a subpoena seeking her confidential information, courts do allow OSPs standing to challenge subpoenas on the basis of the user’s First Amendment rights.

Although fiduciary law is messy, arguments for the formation of a fiduciary relationship between users and OSPs can be made, primarily because the user is reposing trust in the OSP and is also relying on the superior knowledge of the OSP in the creation of their website. Furthermore, if an agency relation-

273   Ne. Gen. Corp. v. Wellington Adver., Inc., 624 N.E.2d 129, 131 (N.Y. 1993) (“Probing our precedents and equitable principles unearth no supportable justification for such a judicial interposition . . .”); see also Brinsights, LLC v. Charming Shoppes of Del., Inc., No. 06 Civ. 1745(CM), 2008 WL 216969, *8 (S.D.N.Y. 2008); In re Verlink Corp., 405 B.R. 356, 375 (Bankr. N.D. Ala. 2009) (“Trustee has failed to cite any case in which an investment bank was held to be a fiduciary in the face of express contractual disclaimers.”).
275   Id.
276   See discussion supra III.E.
ship is established, because confidential information is passed on, that action may create a fiduciary relationship between the agent and principal. However, the argument that no fiduciary relationship exists is equally persuasive, primarily because the confidential relationship communicated to the OSP is not kept very confidential. Despite these arguments, an OSP can potentially avoid the formation of a fiduciary relationship by including an express term disclaiming the creation of such a relationship, as well as explicitly laying out the duties of the OSP when it receives a subpoena seeking personal information.

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