Protecting Anonymity

－First Amendment Rights and Defamation Victims on the Internet－

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목 차

Ⅰ. Introduction

The importance of anonymous speech has been clearly stated in the United States Supreme Court and affirmed many time.[1] Anonymous speech is protected by the First Amendment of the Constitution under a person's right to free speech. The Founding fathers of America relied on this right as they published the Federalist Papers anonymously, which helped lead to many compromises that were necessary for the Constitution to be ratified. The right to anonymity has been recognized in many different mediums of communication. In today's modern world, the court has had to wrestle

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1) *See generally Talley v. California*, 362 U.S. 60(1960) and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334(1995).

with the issue of anonymous blogging. It is relatively easy for posters to write whatever thought that comes into their head and put it out on the World Wide Web for everyone to see, which can quickly been seen by thousands or even millions of people within minutes. The internet is an amazing tool of the modern age, but it has been abused, as well. Once the internet was created, the courts have been asked to balance the interests of a speaker's right to anonymity and a victim's right to not be harmed by defamatory speech.

The question presented is not about protecting the identity of a blogger who makes unprotected speech. The problem is that most cases can only proceed so far without knowing the identity of the speaker, but once the identity is made known, that person has lost their right to be anonymous. Courts must be careful to protect a defendant's rights in a defamatory law suit. Often the people in power do not care about protecting the civil liberties of individuals and it is up the courts to protect people with minority viewpoints from the tyranny of the majority.

Anonymous speech is necessary because it allows those who have no power to criticize those in control without fear of revenge. People who blog on the internet about their grievances probably have nowhere else to go, but would stay silent if they knew that their identity would be revealed and could possibly subject them to public embarrassment and perhaps harassment (or more) from the victim of the speech. Most courts want to be fairly certain that the speech engaged in by the defendant is in fact defamatory, meaning it is not protected speech, before they will take away a defendant's anonymity. The Western District Court of Washington stated that the right to anonymous speech would be meaningless if the speaker did not possess a right to remain anonymous after the speech is published.[2)]

The issue of the right of anonymity on the internet has been discussed by many scholars over the past ten years. Some have argued that anonymous blogging should be treated differently from other forms of speech, such as granting it a lot of protection because of the importance of anonymous blogging, or less protection because of the carelessness of internet bloggers and the harms caused by the statements.[3] The issue of classifying anonymous internet speech plays a role in how the court will treat it when a plaintiff demands that an anonymous speaker be revealed by court order. Perhaps the nature of the speech should not affect the level of protection the speaker will receive, which is what many courts reviewed below believe.

This paper will introduce the current law in this area, mostly focusing on the widely followed cases of *Dendrite v. Doe* and *Doe v. Cahill*.[4] Then it will examine some surprising cases that refused to follow *Dendrite* and *Cahill*, including *Thomas M Cooley Law School v. Doe* which sparked the author's interest in this issue.[5] Thirdly, it will discuss what this decision could mean for future defendants in anonymous internet blogging cases. And lastly, it will compare how Korea views the issue of anonymous blogging and how Korea might treat anonymous bloggers who wished to remain so.

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2) *John Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088, 1093(W.D. Wash. 2001).

3) For a more complete picture of this discussion, see Glenn Harlan Reynolds, "Libel in the Blogosphere: Some Preliminary Thoughts", 84 *Wash. U. L. Rev.* 1157(2006) and Daniel J. Solove, "A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere", 84 *Wash. U. L. Rev.* 1195(2006).

4) *Dendrite Int'l, Inc. v. Doe, No. 3*, 775 A.2d 756(N.J. Super. Ct. App. Div. 2001) and *Doe v. Cahill*, 884 A.2d 451(Del. 2005).

5) *Thomas M Cooley Law School v. Doe*,---N.W.2d----, 2013 WL 1363885 (Mich.App.), 41 Media L. Rep. 1715.

Ⅱ. Current Law

There are no Supreme Court cases dealing with the issue of how much protection individuals must be given in order that their First Amendment rights are protected. Currently, each jurisdiction is free to decide the appropriate level of protection that defendants must be given when they are subject to a defamatory law suit. Courts have applied various rules as to when the anonymous blogger can be identified. Many courts have wrestled with the issue of what to do in these circumstances. While some courts have given more protection to bloggers, others have lower standards for victims of defamation to overcome. These lawsuits against anonymous bloggers force the courts to engage in a unique procedure. Before a case can go forward, the plaintiff will request a hearing where the court will decide whether to "out" the defendant. Some courts have made it easy for the plaintiff to get the defendant's identity while other courts require a high standard of proof that plaintiffs must show before they can get the defendant's identity. Currently, the most widely followed rules come from *Dendrite v. Doe* and *Doe v. Cahill* (*Dendrite* inspired *Cahill*, but refused to adopt all parts of the *Dendrite* test). Below is an overview of some of the rules that various courts follow when deciding the correct level of proof.

1. Cases that Are More Favorable to Plaintiffs

The rule from *Melvin v. Doe I*, a Pennsylvania Court decision, is that the court will balance the interests of the victim against those of the speaker. The plaintiff will be allowed discovery of the speaker's identify if the identity "(1) is material, relevant, and necessary, (2) it cannot be obtained

by alternative means, and (3) it is crucial to the plaintiff's case."[6] This rule could be considered favorable to plaintiffs because the plaintiff will always need to know the identity of the speaker in order for a case to go forward. The only protection for a defendant's identity is that the plaintiff must prove "(1) the statement was false, (2) malice, and (3) damages."[7] The court had already accepted that the plaintiff had shown evidence to support a prima facie case; therefore the plaintiff just had to say that it needed the defendant's identity in order to move forward.[8] The court noted the importance of knowing who the defendant is in order for plaintiffs to be able to make informed decisions on whether they should continue the case.[9] The court acknowledged that it set a low standard that would be easy for plaintiffs to meet.[10] But obviously the court considered it necessary to protect the interests of those who suffered from defamatory speech.

In *Columbia Ins. Co. v. Seescandy.Com*, a federal case from California, the court wanted the plaintiff to prove that the suit was not frivolous before plaintiffs could get the defendants' identities. The court required plaintiffs to show their case would withstand a motion to dismiss and then file a request for discovery that stated why the information was needed.[11] Though this not a difficult hurtle for plaintiffs to get over, this concept of not allowing frivolous lawsuits to be used as a means of getting a defendant's identity was accepted and expanded in the *Dendrite* case.

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6) *Melvin v. Doe I*, 2000 WL 33311704, 49 Pa. D. & C.4th 449,477(2000).

7) *Id.* at 479.

8) *Id.* at 452.

9) *Id.* at 453. Perhaps the defendant is not worth taking to court because of his low status in the community or lack of funds.

10) *Id.* at 462.

11) *Columbia Ins. Co. v. Seescandy.Com*, 185 F.R.D. 573, 579-80(1999).

In *in re Subpoena Duces Tecum to America Online, Inc.*, a federal case from Virginia, there was a two-part test where the court required that the plaintiff show he had a "good faith basis" to say he was the victim of defamation and that the identifying information was "centrally needed to advance that claim."[12] This good faith test is easy for plaintiffs to meet, therefore making it easy to obtain the defendant's identity.

In *Maxon v. Ottawa*, a case from Illinois, heard in the 3rd District, the court examined *Dendrite* and *Cahill*, but decided that since its jurisdiction was a fact-pleading jurisdiction, all that was required for a plaintiff to get a defendant's identity was to make a complaint that could survive a motion to dismiss.[13] *Dendrite* and *Cahill* require that notice be given to the defendant before a court can require a defendant's identity be disclosed. The test for determining if a statement is defamatory was whether it could be "reasonably interpreted as stating actual fact."[14]

In the state of Virginia, there is a statute dealing with the issue of anonymous bloggers. It says, in part, "this statute requires that one show that the statements 'may be tortious' and that the 'identity of the anonymous communicator is important, is centrally needed to advance the claim, relates to a core claim or defense, or is directly and materially relevant to that claim or defense.'"[15] This is a very low bar for a plaintiff to overcome. Most plaintiffs should be able to show whatever statement they think is tortious "may be tortious," the identity of the speaker is almost always going

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12) *In re Subpoena Duces Tecum to America Online, Inc.* 2000 WL 1210372, *8.

13) *Maxon v. Ottawa Pub. Co.*, 402 Ill.App.3d 704, 715, 929 N.E.2d 666, 676 (2010).

14) *Id.* at 716, 677(citations omitted).

15) *Hadeed Carpet Cleaning, Inc. v. Doe*, 2012 WL 6756016(Va.Cir.Ct.)(Trial Order).

to be important for a claim to continue and the identity is also almost always going to be relevant to a claim or defense. This law appears to make it almost impossible to protect one's anonymity when saying questionable things.

2. Cases that Seem More Favorable to Defendants

Dendrite v. Doe is from the New Jersey appellate court. In this case, the court made demanded that a plaintiff will have to prove many elements if she wants the identity of a defendant revealed. The plaintiff must attempt to notify the defendants of the subpoena, produce the statements that plaintiff alleges are defamatory, and set forth a prima facie cause of action (an action which can withstand a motion to dismiss and evidence supporting each element of the cause of action).[16] After that, the court will do a balancing test of the "defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed."[17] The language of the case shows the court considers the defendant's right to anonymous speech to be worthy of protection, so the balancing test is an added defense that right. In this case, the court concluded that the plaintiff had failed to show it had been injured by the defendant's speech.[18] The defendant's identity could not be revealed given the evidence presented by the plaintiff.

Doe v. Cahill is from the Supreme Court of Delaware. The lower court

16) *Dendrite* at 141, 760.

17) *Id.* at 142, 760-61.

18) *Id.* at 147, 764.

had applied a “good faith” standard and denied the defendant’s motion for a protective order.[19] The higher court reversed and remanded the case and stated that the plaintiff must satisfy a summary judgment standard before obtaining a defendant’s identity.[20] The court wanted to offer more protection than merely requiring the plaintiff to give notice of the claim asserted.[21] The court was worried that frivolous suits often can survive a motion to dismiss, so a higher standard would be needed to properly balance the interests of First Amendment free speech and rights against defamation. The court considered the *Dendrite* test and decided that they would adopt the first and third prongs of the test. In *Cahill*, the court did not think the balancing best was necessary because the summary judgment test provided a balance already.[22] The court concluded that the statements appeared to be opinions and not allegations of fact, meaning the statements at issue were not defamatory under the meaning of the law.[23] Since the plaintiff could not prove the first prong of the *Dendrite* test, the lower court’s decision not to give the defendant a protective order was overturned.

Courts that seem to be concerned about protecting anonymous speech want plaintiffs to show that their case would withstand a motion for summary judgment. Withstanding a motion for summary judgment shows that the plaintiff has a solid case, which helps the court recognize that the case has merit. The court can feel more secure that it is not turning over a defendant’s identity to a plaintiff that is just looking for a name, and not necessarily trying to protect itself against unlawful speech. The Arizona

19) *Cahill* at 455.
20) *Id.* at 457.
21) *Id.* at 458.
22) *Id.* at 461.
23) *Id.* at 467.

Supreme Court stated in *Mobilisa, Inc. v. Doe* that withstanding a motion for summary judgment "furthers the goal of compelling identification of anonymous internet speakers only as a means to redress legitimate misuse of speech rather than as a means to retaliate against or chill legitimate uses of speech."[24] These jurisdictions are worried that without requiring a high standard of proof, defendants' rights to anonymous speech would be chilled, and that the First Amendment would lose its meaning.

3. After *Dendrite* and *Cahill*

Most courts across the United States are adopting rules similar to those seen in *Dendrite* or *Cahill*, but one recently decided case in Michigan shows that those rules are not accepted everywhere. In *Thomas M Cooley Law School v. Doe*, the court stated explicitly they were not going to follow *Dendrite*. Instead the court said, "[w]e disagree with the trial court's conclusion that Michigan law does not adequately address this situation. We conclude that Michigan's procedures for a protective order, when combined with Michigan procedures for summary disposition, adequately protect a defendant's First Amendment interests in anonymity."[25] The court goes on to note that protective orders are "flexible" and can be tailored to protect the defendant's First Amendment rights.[26] The court was not concerned about a hypothetical case where the plaintiff only brought suit to get the defendant's name and with no expectation of damages(which seems to be most defendants' fears.) The court said they felt confident that

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24) *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 111, 170 P.3d 712, 720(2007).

25) *Thomas M Cooley Law School*, 41 Media L. Rep. 1715.

26) *Id.*

their protective order laws would be able to offer defendants the sort of protection they deserve under the First Amendment.[27]

Justice Beckering concurred and dissented in part. She would have preferred to follow the national trend of adopting the *Dendrite* or *Cahill* rules.[28] In fact, her preference was for a modified version of *Dendrite* because she felt that defendants should have the added protection that a balancing of the strength of the plaintiff's case against the rights of the defendants would give. She was worried about the need for notice to the defendants so that they will have time to file a protective motion or fight a subpoena demanding the release of the defendant's identification.[29] Not all service providers are willing to vigorous protect the rights of their clients, so defendants must be given the chance to defendant their own rights when threatened.

It is unclear at the moment if other courts will also decline to follow Dendrite. Critics of the Michigan decision worry that it does not offer enough protection for defendants, while others applaud the decision as a sign of judicial restraint. By judicial restraint, they mean that in *Thomas M Cooley Law School*, the court was not creating new laws by applying another court's interpretation of what is required to adequately protection a defendant's First Amendment rights. Instead, the court applied existing state to deal with the issue.

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27) *Id.*

28) *Id.*

29) *Id.*

Ⅲ. What These Cases Could Mean for Future Parties

Different jurisdictions will decide whether to apply the standards seen in *Dendrite* and *Cahill*, some other standard or conclude that their own rules already in place are sufficient to protect the rights of anonymous speakers. The problem with the courts that allow plaintiffs an easier process of obtaining defendant's identities is the potential chilling effect on the freedom of speech. If these jurisdictions make decisions that do chill the freedom of speech, the Supreme Court might be forced to step in to ensure people's rights are being protected. There are already fully developed rules dealing with defamation in various situations. Political speech and speech against public figures is given the highest level of protection, while defamatory speech against private individuals is judged more harshly. Politicians expect to be questioned and they have more political and social power than the average citizen. Also, it is unlikely that the public will accept as fact blog posts by anonymous bloggers. Those types of speech are given less respect than publications by the media, so perhaps the harm done to the plaintiffs isn't as severe as defamatory speech done in other mediums. That line of thinking can be dangerous, though because then it seems like we are treating internet speech differently from other forms of speech. There is no constitutional basis for treating different mediums of speech differently.

The biggest reason to be so careful of a defendant's identity is because, once it is revealed, they have lost the value of anonymous speech. If a mistake is made by the court in allowing the defendant's identity to be revealed, it cannot easily be hidden again. In *Melvin v. Doe II*, the court expressed the importance of being careful when revealing a defendant's identity. The court was asked to answer the question of whether an

anonymous blogger defendant can appeal the decision to have his identity revealed. The court stated, "[t]here is no question that generally, the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, and that it falls within the class of rights that are too important to be denied review."[30] It's such an essential right that it can and should be dealt with separately and completely adjudicated before the court moves on the issue of whether actual defamation took place.

The court in *Dendrite* was worried that plaintiffs would use discovery rules to find out defendants' identities in order to "harass, intimidate or silence critics in the public forum."[31] In *Cahill*, the court thought that many defamation plaintiffs are not looking for a judicial remedy, but are mostly interested in unmasking the defendant.[32] These courts defended their position that a defendant's identity is very precious. The courts are only going to "unmask" the defendant when they are convinced that the plaintiff has an actual defamation suit against the defendant and isn't just trying to find out the defendant's identity in order to seek extrajudicial revenge.

One critic of the *Cahill* rule was S. Elizabeth Malloy. She suggested a few problems with the rule, such as it gives too much deference to anonymous bloggers.[33] The judges in these decisions suggested that the nature of internet blogging makes it unlikely that anonymous speech could ever be considered a statement of fact rather than an opinion.[34] The problem

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30) *Melvin v. Doe II*, 575 Pa. 264, 278, 836 A.2d 42, 50(2003).

31) *Dendrite* at 156, 771.

32) *Cahill* at 457.

33) S. Elizabeth Malloy, "Anonymous Bloggers and Defamation: Balancing Interests on the Internet", 84 *Wash. U. L. Rev.* 1187, 1190(2006).

34) *Cahill* at 466.

with this viewpoint is that it might become almost impossible for victims of anonymous blogging to prove that any anonymous internet speech rises to the level of defamation.[35] The court in *Cahill* went to say that the law should not treat internet communication differently from other forms of communication.[36] The victims that are at risk are average people who are defamed on the internet. They are the ones who are most vulnerable to careless or malicious comments made on the internet that anyone can look up, such as potential employers or nosy neighbors. Someone who is a victim of a defamatory statement might risk losing their job or even being injured by private citizens if falsely accused of committing terrible acts.[37]

The court in *Cahill* also suggested that instead of looking to the courts for help, victims of defamation should instead rely on self-help, another problem pointed out by Malloy.[38] The court did not imply that people should go out and get revenge, but that they were just as free to log on to whatever website was saying negative things about them and refute those statements.[39] There are multiple problems with this. Sometimes bloggers do not allow comments, so the victim might not be able to refute the statement in the same location that the statement was made. Also, just because the victim is able to refute the statement does not mean that people who saw the initial statement will also see the rebuttal.[40] And even if

35) Malloy at 1192.

36) *Cahill* at 465.

37) Malloy at 1191. *See* Associated Press, "Lawyer Accused in Stabbing Death of Neighbor; Father Allegedly Suspected Neighbor of Molesting his Young Daughter", NBCNews, Sept. 1, 2006. Available at http://www.msnbc.com/id/14610951(last visited July 18, 2013).

38) *Id.* at 1192.

39) *Cahill* at 464.

40) Malloy at 1192.

they see the responsive statement, it doesn't mean they will believe it, especially if the rebuttal is by the victim. One of the main purposes for a legal system is to stop people from engaging in self-help. It goes against the whole concept of the social contract, which is supposed to take over the role of getting justice for victims.

The court must protect victims when they are injured by illegal speech. But courts need to be careful with such cases because of the unique nature of anonymous speech. If anonymous speech is a constitutionally protected right(which it has been recognized to be), then it must be protected. However, once the court orders the defendant be identified, the defendant's rights have been violated if the court does not later find that the speech he engaged in truly was defamatory under the meaning of the law.

Ⅳ. Anonymous Speech in Korea

Korea is not so different from most democracies in that it offers protection of the freedom of speech. But Korea is not the United States. Korea has a different cultural background and does not put the freedom of speech on the same high pedestal that Americans do. The Korean Constitution suggests that Korea is concerned about other rights that might be damaged by speech. The Korean government has a different viewpoint of the level of protection that should be afforded a person's right to anonymous speech and their right to protection of reputation. While in the United States, there are laws that protect a person's reputation, it is not protected by the Constitution, while in Korea, it is.

The Korean Constitution states in Article 21 that "[n]either speech nor

the press shall violate the honor or rights of other persons nor undermine public morals or social ethics."[41] There is nothing similar to this in the American Constitution. The United States' law does stop speech that harmful to society or harms a person's reputation, but only in limited circumstances. Freedom of speech is considered one of the most important rights a person can have. Judge Kwon pointed out in an article he wrote that Korea considers the protection of reputation as more important than the United States,[42] which places freedom of speech in the 1st Amendment of the Constitution and makes no mention of limitations on that freedom.[43] The Korean Constitution may have limits on the freedom of speech, but it is protected. The Korean Constitution also states that "all citizens shall enjoy freedom of speech, and the press, and freedom of assembly and association."[44] Freedom of speech is protected, but it is not revered as something sacred like Americans tend to do.

The Korean Constitution also states that there are limitations on when the freedom of speech can be controlled. In Article 37(2) of the Constitution, it states, "the freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare."[45] Korea will only restrict speech if that speech is dangerous to the nation or rights of the people. There might be an issue of when speech actually threatens the public welfare, but that issue is beyond

41) Constitution of Korea, Art. 21(4)(1987), translated at http://www.ccourt.go.kr/home/att_file/download/Constitution_of_the_Republic_of_Korea.pdf (last visited Aug. 12, 2013).

42) Youngjoon Kwon, "Tortious Liability of Internet Service Providers for Defamation: A Korean Persepctive", 5.2 *J. Kor. L.* 121, 127(2005).

43) U.S. Const. amend. I.

44) *Id.*, Art. 21(1).

45) Constitution of Korea, Art. 37(2)(1987).

the scope of this article. Korea has also signed the International Covenant on Civil and Political Rights Treaty, which offers additional protection for the freedom of speech from the government. In Article 19, it states "everyone shall have the right to hold opinions without interference," "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[46] Depending on how much weight the Korean government gives this treaty, the right to anonymous speech on the internet should definitely be protected as much as possible if it's a political and civil right.

American and Korean courts judge the protection of rights differently. When the American Constitutional Court is trying to decide if some law infringes on a person's freedom of speech, they usually try to see if there is a compelling state reason to do so. If no such reason exists, the speech must be protected and the law that is affecting the speech is struck down. American courts will consider conflicting interests when two rights come in conflict, but all laws must offer a certain level of protection of speech. In Korea, the way to decide which right will win when rights conflict is different. First the reviewing court will decide if one right is "more constitutionally important than the other."[47] If one right is more "important"

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46) International Covenant on Civil and Political Rights, March 23, 1976, 〈http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.〉, (last visited August 14, 2013).

47) Tae Yong Kim, Student Note, "Conflict of Interests: Through the Lens of Privacy of Communication Versus Freedom of the Press", 9 *Kor. Uni. L. Rev.* 61, 77(2011) citing translated in Young-Sung Kwon, *The Principle of Constitutional Law* supra note 42, at 341-342(2010 S.Kor.).

than the other, the judge's analysis is finished. However, if they are both important rights, the court will apply "the principle of practical concordance."[48] The point of this principle of practical concordance is that one right is not pushed aside in favor of a right that is concerned more "important." This approach might be better because all rights are important or they would not be considered "rights." One author notes that this method is also better because the aim to allow both rights to be exercised at the highest level possible.[49] By balancing the two rights against each other, it also allows for more flexibility to ensure they are both adequately protected.[50] Perhaps the Korean approach might be a more reasonable way to look at conflicting rights in the United States. In the United States, most decisions that deal with conflicting rights will have one clear winner, while the losing right is pushed aside.

Even though Korea might not protect the freedom of speech to the same level as the United States does, it is constitutionally protected. With the creation of the internet, Korean citizens have gained the chance to share their ideas and opinions with a large audience without having to be in media. Some Korean scholars have pointed out that the internet has played an important role in Korean society as it recovered from the wars and less than democratic governments Korea suffered in the past. Judge Kwon wrote that "[o]nline democracy has reached its pinnacle, due mainly to two factors: a remarkably high broadband penetration rate and a great number of electronic bulletin boards."[51] Korea is one of the most internet-friendly

48) *Id.*

49) *Id.* at 72.

50) Kim at 77 citing translated in Young-Sung Kwon, *The Principle of Constitutional Law* supra note 42, at 341-342(2010 S.Kor.).

51) Youngjoon Kwon, "Tortious Liability of Internet Service Providers for

places in the world and the ease of using the internet and posting things should have the effect of creating a perfect marketplace of ideas as envisioned by John Stuart Mill. Judge Kwon went on to note that some netizens abuse their anonymity in order to harm others.[52] There needs to be some control of the internet by the legal system. Korea is not going to offer as much protection as one would expect in the United States for anonymity on the internet, but some high level court decisions suggest that Korea does hold the right to anonymous speech in esteem.

Besides looking at what the law says about the freedom of speech, it's more important to understand how the courts will apply that law. A recent decision in the Korean Constitutional Court affirmed the right to speak anonymously on the internet as a right that should be robustly protected.[53] In this 2010 case, the Court struck down a law that required that Korean websites verify and keep records of users' identities. Complainants argued the law had a chilling effect on the freedom of speech, because some users might not want to verify their identity before being allowed to post on a website. The complainants argued it acted a form of prior constraint, but the Court disagreed because there was no investigation based on the content of the speech. The Court affirmed, however, that the law did infringe on a users' right to anonymous speech.[54] Because people have that right, the way a person expresses their right to anonymous speech is not limited by

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Defamation: A Korean Perspective", 5.2 *J. Kor. L.* 121, 122(2005).

52) *Id.*

53) *Re: Confirmation of unconstitutionality of Article 44-5, Paragraph 1, Subparagraph 2 etc. of the Act to Promote the Use of Communications Network and to Protect Information*, 2010 Heon Ma 47, 252(Constitutional Court of Korea). (Unofficial translated version used.)

54) Constitutional Court Case 2008 Heon Ma 324, dated 25 February 2010, Case Report Vol. 22-1A, pp. 347, 363(Constitutional Court of Korea).

the medium they choose to use. The government is allowed to make laws that limit speech if the law's aim is legitimate, but the means chosen to accomplish that goal cannot be excessive. The Court found that the law requiring the identification and retention of personal information before someone can post on a website went too far. The Court said that people who need to be punished can be dealt with by existing criminal laws, and that the law at issue does not accomplish its goal. People without resident numbers(non-resident Koreans and foreigners alike) cannot post on Korean websites. The Court also noted that no other country had such a law. It says, "[i]n particular, anonymous expressions allow free expression and propagation of ideas in spite of explicit or implicit pressure to suppress such ideas."[55] This case suggests that the Korean government will protect the right to express oneself anonymously. However, it is difficult to predict how the Korean government will deal with anonymous speech that conflict with a person's right to his reputation.

There have been other Korean Court decisions that have dealt with the issue of freedom of speech on the internet which might give some insight as to how Korea would deal with cases similar to those from the United States discussed above. In the Nownuri case, the Korean Constitutional Court struck down a section of the Electronic Communication Business Act.[56] The law gave the Ministry of Information and Communication the power to order website portals to delete posts and other contents that interfered with "public order and peace."[57] In that case the Court wrote, "the

55) 2010 Heon Ma 47, 252.

56) Constitutional Court, 1999 HunMa 480, decided on June 27, 2002.

57) K. S. Park, "Mandatory Identity Verification in the Internet: Did Google Do the Right Thing?", 5 *Kor. Uni. L. Rev.* 203, 213(2009).

democratic nation may not primarily determine the value and harm of an expression or information but leave such determination be decided by competitive mechanism between self correction of civil society, ideology and opinions."[58] The Court recognized that allowing speech to be banned by a government agency tasked with the job to decide what speech interferes with "public order and peace" was too vague and did not offer the kind of protection that the Korean Constitution guaranteed. Also, the Court seemed to agree with the idea of allowing the marketplace of ideas to deal with good and bad speech. People can decide for themselves what is worth listening to and what is not. The Court went on to state an idea seen in the 2010 case noted above; that it is more important to under-regulate illegal speech rather than "excessively restricting expression."[59] A democratic nation should always err on the side of under-regulating speech. Once a country allows too much regulation of speech, the country will no longer be free to express ideas that go against what the majority thinks and will slowly devolve into a totalitarian nation.

These two Korean Constitutional Court decisions clearly express the importance of freedom of speech on the internet. However, this emphasis on the importance of speech was only supported by the minority in a Korean Supreme Court case from 2006. This case dealt with a conflict between the right to freedom of the press and the right of privacy in communication. The minority viewpoint thought that when privacy of communication came into conflict with the freedom of speech (in this case it was freedom of the press), it was too difficult to say which right was more important.[60]

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58) Park, at 213(2009), *citing* Constitutional Court Case 99HunMa480, dated 27 June 2002(Constitutional Court of Korea).

59) 1999 HunMa 480, at 630.

The minority was concerned about one right being sacrificed because of some "arbitrary balancing test of which yields the greatest benefit."[61] The minority wanted to try to figure out a way that both interests could be maximized before deciding how to deal with the law at issue. The minority wanted to create a rule on under what circumstances potentially illegally obtained private communications could be disclosed to the public through the media.[62] The minority would have allowed the speech because they felt that the benefit to the public outweighed the harm to the privacy of the victim.[63] The minority made a great statement about how freedom of speech is a fundamental right which allows "an individual [to] pursue[] the realization of oneself in the values that make up one's identity through media activity and maintains a co-existing relationship with others members of society under the fundamental principle of equal protection and respect, and it is also the means with which one realizes self-governance, which is a social value of participating in the political decision-making process."[64] Though the minority opinion was inspiring, the majority opinion is the law. The case held that the illegally gained information did not possess a benefit to society that was enough to overcome the bad actions that allowed it to be collected and dispersed to the public.[65]

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60) Supreme Court en banc Decision 2006Do8839 Decided March 17, 2011[Violation of the Protection of Communications Secrets Act], citing Supreme Court Decision 99Do5190, Feb. 26, 2004. Translation at http://library.scourt.go.kr/jsp/html/decision/9-2006Do8839.htm (last visited August 14, 2013).

61) *Id.*

62) *Id.*

63) *Id.*

64) *Id.*

65) *Id.*

These cases represent core decisions made by the highest courts of Korea dealing with the freedom of speech and the internet. Many judges in Korea seem to hold internet speech in high regard, which could mean that if Korean courts are faced with a similar dilemma as seen in *Thomas M Cooley Law School v. Doe*, they might be willing to uphold the right of anonymity at the expense of a person's right to protect his reputation. Even though the court in that case declined to follow the more protective of free speech decisions seen in *Cahill* and *Dendrite*, perhaps the Korean judicial system would also want to offer a high level of protection to anonymous internet speakers. They were willing to do so in the 2010 Constitutional Court case, which spoke of the importance of speaking anonymously on the internet. However, the 2008 Supreme Court case felt that privacy of communication was more important than the freedom of the press sharing conversations made by politicians, who in the United States are considered public figures that have less of an expectation of privacy. It is difficult to predict how the Korean government will deal with the right of anonymous speech on the internet. It is clear that it will be protected. Considering even within the United States, which some people think give excessive weight to the importance of freedom of speech, has not settled on a point at which a speaker's right to anonymity can be taken away, guessing what Korea would do might be unpredictable.

V. Conclusion

As stated above, the courts in the United States have been wrestling with the issue of how to deal with the conflicting interests of a speaker's

right to be anonymous and a plaintiff's right to protect her reputation and bring a suit against a speaker who harms her. There has not been a Supreme Court decision on this issue, so each jurisdiction in the United States has had to come up with their own theory of what method will adequately protect the rights of anonymous speech while also giving plaintiffs a chance to bring suit. Many legal scholars believed that the trend of following *Dendrite* and *Cahill* would continue in other jurisdictions. However, the *Thomas M Cooley Law School* case made it clear that those previous predictions could not be relied on. This change in the direction of where the law is heading in regards to protection of anonymity of internet speakers could mean a few different things. It could just be a fluke seen in Michigan and will not be repeated in other jurisdictions. Or perhaps the states will become more divided on the issue of what is necessary in order to protect someone's First Amendment rights. If there is a case where the American Supreme Court justices feel that a lower court has not done enough to protect the freedom of speech, they will most likely accept that case and make a decision as to what is will be required in those circumstances. But remember that any decision made by the Supreme Court of the United States is meant as the least a state should do to protect the rights of those in its jurisdiction. States are free to offer more protection than the United States Constitution demands. Perhaps there will never be a Supreme Court decision dealing with this issue as long as the jurisdictions giving the least amount of protection are at least doing the "bare minimum."

Looking at decisions made by the Korean Supreme Court and Constitutional Court, it is possible that there might be high levels of protection given to anonymous internet speakers if someone brings a defamation suit against them. Even in the Supreme Court, the minority

opinion could be signaling a change in how people view the anonymous free speech. It seemed clear that the Constitutional Court is in favor of protecting it, at least to a certain degree. Freedom of speech has always been held up as a necessary component of democracy. Though speech should not be unlimited, the channels of communication between citizens' needs to be open so that ideas can be shared and problems recognized. Korea will continue to protect all the rights of citizens, including those of reputation and speech. How those two rights will be simultaneously protected through, will be something to watch.

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Key Words : anonymity on the internet, anonymous bloggers, anonymous free speech, defamation, First Amendment, freedom of speech

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[국문초록]

익명성의 보호
-수정헌법 제1조와 인터넷상 명예훼손피해자-

Patricia Ruth McWilliam*

익명의 연설은 항상 언론의 자유의 중요한 요소로 고려되어진다. 그러나 법원은 그러한 권리의 한계를 두고 고민해 왔다. 이 논문은 원고가 익명의 발언에 의해 피해를 받았다고 주장할 때 인터넷상 익명의 발언자가 언론의 자유의 권리를 잃어버릴 수 있는 것에 관한 미국법원의 판결을 다루고 있다.

발언자가 익명의 권리를 상실하는가의 문제를 다루고 있는 대표적인 판결은 Doe v. Cahill 판결과 Dendrite International, Inc. v. Doe 사건이다. 이 두 사건의 법원들은 원고가 명예훼손 소송에서 이길 것 같은 정도로 충분한 증거를 보여주지 않은 한 익명의 발언자들에게 많은 보호를 제공한다는 것이다. 미국의 많은 법원들은 위의 사건의 결과를 따르는 것으로 보인다. 그러나 Thomas M. Cooley Law School v. Doe 사건의 판결은 많은 법학자들에게 놀라움을 안겨주었다. 그 이유는 이 사건에서 법원이 Cahill 과 Dendrite 판결을 명시적으로 거부했기 때문이다. 이 논문은 Thomas M. Cooley 사건이 익명의 인터넷 발언에 대하여 미래에 어떤 의미를 가져다줄 것인지와 한국 법 체계가 인터넷 발언에 대하여 취하는 입장에 어떤 영향을 끼칠지, 그리고 한국 법원들이 비슷한 사건에 대하여 어떻게 대처할 것인지에 대하여 다루고 있다.

한국이 인터넷상 익명의 발언을 원칙적으로 보호한다는 것은 명백하

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다. 그러나 한국은 또한 미국에서처럼 명예훼손을 당하지 않을 권리도 중요하게 생각한다. 익명의 연설권리는 만일 그것이 인터넷이건 일반적인 미디어를 통해서 이루어지건 간에 보호되어야만 한다. 그러나 그러한 권리는 명예훼손 당하지 않아야 할 권리와 균형있게 주어져야 한다. 혹자는 Cahill과 Dendrite사건이 익명의 발언자에게 너무 많은 보호를 주었다고 비판할지도 모른다. 그리고 한국은 그러한 유사한 사건에서와 유사한 규칙을 정립할지도 모르겠다. 그러나 한국에서도 익명성의 권리는 어느 정도 수준까지는 보호될 것 같다.

주제어 : 인터넷의 익명성, 익명의 블로거, 익명의 언론의 자유, 수정헌법 제1조, 언론의 자유