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**Anonymous online speech: striking a balance between  
accountability and the right to freedom of expression**

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**Abstract**

*The Internet enables individuals to speak anonymously with unprecedented ease. As a result there has been a global increase of anonymous online speakers which raises unique legal regulatory challenges. For the purpose of ensuring anonymous online speakers are held accountable for harmful speech, the Harmful Digital Communications Act 2015 in New Zealand introduces a remedial measure which empowers the District Court to order the disclosure of an anonymous online user's identity. This paper seeks to draw attention to issues concerning an individual's use of anonymity online to exercise their right to freedom of expression. The paper concludes by providing recommendations on how the courts can effectively balance this right against the principle of accountability which guides the disclosure orders in a manner which is compliant with the Bill of Rights.*

**Key Words**

Anonymity; digital communication; Harmful Digital Communications Act 2015; freedom of expression; accountability

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## ***I Introduction***

Anonymity has been defined as a “shield from the tyranny of the majority”.<sup>1</sup> In the context of current digital communication practices with an associated unprecedented ease of concealing identity, there has been a dramatic increase in the number of speakers using the ‘shield’ of anonymity online.<sup>2</sup> In addition there has been a parallel significant rise in the number of speakers using anonymity to avoid accountability for the effects of their speech.<sup>3</sup> A widely observed tendency of anonymity online to encourage harmful digital communication is an international concern, and strategic restrictions on the capacity of individuals to hide their identity are being employed by governments and online content hosts alike with the general aim to reduce abusive communications online and uphold individual accountability.<sup>4</sup> In recent decades, the Internet has arguably become the central mode of communication for societies worldwide and the need for a regulatory framework is increasingly necessary.<sup>5</sup> In balance, the Internet is also widely valued as a forum for free speech in which anonymity plays a key role in fostering the exercise of an individual’s right to freedom of expression online in meaningful ways.<sup>6</sup> As a result, legal mechanisms undertaken to discover the identities of anonymous online speakers encounter a fundamental tension between the principle of personal accountability for one’s actions and the right to free speech.

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<sup>1</sup> *McIntyre v Ohio Elections Commission* 514 U.S. 334 (1995) at 357.

<sup>2</sup> Cabinet Social Policy Committee “Harmful digital communications: Cabinet social policy committee paper” at 10.5.

<sup>3</sup> Law Commission *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) at 7.5.

<sup>4</sup> Danielle Keats Citron *Hate Crimes in Cyberspace* (Harvard University Press, United States, 2014) at 238.

<sup>5</sup> Brian Murchison “Anonymous Speech on the Internet” in Dan Hunter, Ramon Lobato, Megan Richardson and Julian Thomas (eds) *Amateur Media: social, cultural and legal perspectives* (Routledge, New York, 2013) at 187.

<sup>6</sup> R. Campbell, C.R. Martin, B. Fabos *Media and culture: mass communication in a digital age* (9<sup>th</sup> ed) (Boston & New York, Bedford/St. Martins, 2014) at 570.

The Courts in New Zealand will encounter this legal challenge around the disclosure of the identity of anonymous online speakers when the recently enacted Harmful Digital Communications Act 2015 (HDCA) comes into effect. A remedial measure included in the Act empowers the District Court to order the disclosure of an anonymous online user's identity in circumstances where the user has engaged with harmful digital communications.<sup>7</sup> The Act is New Zealand's statutory initiative to combat abusive behavior online and is intended to specifically respond to unique characteristics of digital communication that foster abuse.<sup>8</sup> The capacity to be anonymous has been identified as one such characteristic due to its tendency to shelter speakers from the consequences of their actions.<sup>9</sup> In order to hold individuals accountable for abusive speech, the Act includes a remedial measure which empowers the District Court to order an online content host or Internet Protocol Address Provider (IPAP) to release the identity of an anonymous account user.

When making such disclosure orders, the Court is required to act consistently with the rights and freedoms guaranteed in the New Zealand Bill of Rights Act 1990 including the right to freedom of expression in s 14.<sup>10</sup> This paper argues that due to the breadth of types of communication encapsulated by the HDCA and the likelihood in the current digital environment of an increase in applications for disclosure of the identifying details of anonymous speakers, such applications before the Court will involve individuals and groups whose speech upholds fundamental rationales of freedom of expression. In these circumstances the Court will be required to determine which legal interest outweighs the other - the rationale of individual accountability versus the individual's right to freedom of expression. As these types of orders are unprecedented in New Zealand, this paper draws on analogous areas of law and overseas experience to recommend considerations the Court should take into account in the balancing exercise required to determine

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<sup>7</sup> Sections 19 (2) (b) and (3) - the Act has adopted the same meaning of an IPAP as is used in section 122A (1) of the Copyright Act 1994. It is an entity that provides internet access to users and allocates internet protocol (IP addresses).

<sup>8</sup> (25 June 2015) 706 NZPD 4830.

<sup>9</sup> Law Commission, above n 3, at 7.4.

<sup>10</sup> Harmful Digital Communications Act, s 19 (6).

whether and to what extent the type of anonymous online speech being dealt with deserves protection.

Section II discusses the policy motivations behind the statutory power to order the disclosure of an anonymous online speaker under the HDCA and considers the role of s 14 of the Bill of Rights. Section III discusses the rationales for protective and restrictive approaches towards the regulation of anonymous online speech. Section IV considers the extent to which balancing exercises have been engaged with in pre-existing legal approaches towards the disclosure of anonymous speaker's identities within New Zealand and overseas. Drawing together observations in the previous sections, Section V proposes that a court should consider anonymous online speech as protected by s 14 of the Bill of Rights and conduct a contextual analysis to determine whether it is outweighed by a legal interest in disclosure.

## ***II The Harmful Digital Communications Act 2015***

### ***A Purpose and procedure***

The Harmful Digital Communications Act 2015 creates a civil enforcement regime intended to deter, prevent and mitigate harm caused to individuals by digital communication and provide victims of such communication with efficient and effective forms of redress.<sup>11</sup> The Act developed out of a review conducted by the Law Commission in 2012 on the regulation of new media in New Zealand called “Regulatory Gaps and the New Media”. This review concluded that existing civil and criminal remedies were insufficient to address new forms of harmful digital communications.<sup>12</sup> The capacity to be anonymous was identified by the Commission in its Ministerial Briefing Paper as a critical feature which distinguishes digital communications from offline

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<sup>11</sup> Section 3.

<sup>12</sup> Law Commission, above n 3, at terms of reference.

communication.<sup>13</sup> In response to this review, the HDCA is intended to specifically target unique characteristics of digital communication.<sup>14</sup> In particular, the rapid dissemination of information to a global audience, the permanence of information online and the ability to be anonymous.<sup>15</sup>

The procedural measures introduced in the HDCA are intended to fill this perceived regulatory gap.<sup>16</sup> Under s 19 the District Court is empowered to make a number of orders including an order to an online content host or IPAP to release the identity of the author of an anonymous or pseudonymous communication.<sup>17</sup> Many online content hosts expressly state in their conditions of service or privacy policies that identifying information about registered users will not be released without a government condoned order.<sup>18</sup> An order under s 19 may be made if there has been a breach of one or more of the “communication principles” specified in s 6 and the breach is likely to have caused harm to a person.<sup>19</sup> A broad multi-factor discretion is further conferred on the Courts for making an order under s 19 (5). In addition an order must be consistent with the rights and freedoms contained in the Bill of Rights.<sup>20</sup>

Formal discussions around the development of the Act have been largely confined to the propensity of anonymity to exacerbate abusive communications, however this is a very limited aspect of the broader issues and values around anonymity in this context.<sup>21</sup> In the

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<sup>13</sup> Law Commission *Harmful Digital Communications: the adequacy of the current sanctions and remedies* (NZLC MB3, 2012) at 10.

<sup>14</sup> Ministry of Justice *Regulatory Impact Statement: Harmful Digital Communications* (November 2013) in Objectives.

<sup>15</sup> (25 June 2015) 706 NZPD 4830.

<sup>16</sup> Ministry of Justice, above n 14, at 18.1.

<sup>17</sup> An online content host is defined in s 4 of the HDCA as “the person who has control over the part of the electronic retrieval system, such as a website or an online application, on which the communication is posted and accessible by the user”.

<sup>18</sup> In *Irwin Toy Ltd v Doe* [1989] 1 S.C.R. 927 the ISP refused to disclose the identity of one of their subscribers to a plaintiff without an application for a court order.

<sup>19</sup> Section 6 (2).

<sup>20</sup> Section 19 (6).

<sup>21</sup> Law Commission, above n 13, at 2.42.

Third Reading of the Act, the Honourable Amy Adams (Minister of Justice) identified anonymity as a feature of the Internet allowing bullying to dramatically extend its reach and impact, but no further issues around anonymity were discussed.<sup>22</sup> As the Ministry of Justice notes however, the communication principles are very broad encompassing communications such as false allegations and the disclosure of sensitive personal information.<sup>23</sup> The Law Commission expressed a concern to ensure that provisions in the HDCA which restrict communications are articulated widely enough to fulfil the legislation's purpose of mitigating harmful digital engagement.<sup>24</sup> The Law Commission acknowledges that as a result not all speech abuses online, even if offensive, would meet the threshold of an offence under the Act.<sup>25</sup> Empowering the District Court to order the disclosure of the identity of the author of an anonymous digital communication is intended to provide a remedy for victims of its harmful use, not to constrain anonymous speech as a whole.<sup>26</sup> The narrow rhetorical focus on anonymity causing harm however neglects consideration of broader issues concerning the importance of anonymity for freedom of expression which will be implicated by the application of the Act.

## ***B The Place of Freedom of Expression***

Section 19 (6) of the HDCA requires the Court to take into account the rights and freedoms guaranteed by the Bill of Rights when making an order to disclose the identity of an anonymous online speaker.<sup>27</sup> This includes the right to freedom of expression under s 14 of the New Zealand Bill of Rights Act 1990 which establishes that:<sup>28</sup>

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<sup>22</sup> (25 June 2015) 706 NZPD 4830.

<sup>23</sup> Ministry of Justice *Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Harmful Digital Communications Bill* (1 November 2013) at 19.1.

<sup>24</sup> Law Commission, above n 3, at 62.

<sup>25</sup> Law Commission, above n 3, at 7.60.

<sup>26</sup> Law Commission, above n 3, at 7.6.

<sup>27</sup> Harmful Digital Communications Act, s 19 (6).

<sup>28</sup> Section 14.

Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form.

The Court is required to interpret legislation in light of the importance of freedom of expression however the Bill of Rights does not confer absolute protection on the rights and freedoms it contains.<sup>29</sup> This is recognized in section 5 of the Bill of Rights which allows for limitations on rights and freedoms if it is demonstrably justified in a free and democratic society.<sup>30</sup> Speech is therefore valued by the law according to a hierarchy.<sup>31</sup> The highest importance is attributed to speech which meaningfully contributes to public discourse such as political speech whereas personal abuse and harassment are considered to abuse the privilege thereby forfeiting protection.<sup>32</sup> The level of protection the courts will afford therefore depends on the type of speech in a particular circumstance.

The Law Commission recommended a legal framework which presumes that a vital role is played by digital communications in a healthy democracy.<sup>33</sup> The HDCA aims to strike a balance between the societal interest of preventing harm and preserving the right to freedom of expression.<sup>34</sup> The Ministry of Justice acknowledges an order to disclose an anonymous user's identity is an indirect constraint on digital communications therefore a limit on the right to freedom of expression.<sup>35</sup> The Ministry of Justice however concluded in advice provided to the Attorney-General on the consistency of the Act with the Bill of Rights that this was a justified restriction.<sup>36</sup> This conclusion was based on the requirements that an order to disclose an anonymous online author's identity can be made only when the communication meets the threshold of serious emotional harm and has

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<sup>29</sup> New Zealand Bill of Rights Act, s 4.

<sup>30</sup> Section 5.

<sup>31</sup> Law Commission, above n 13, at 23.

<sup>32</sup> Law Commission, above n 13, at 23.

<sup>33</sup> Law Commission, above n 3, at 6.

<sup>34</sup> Law Commission, above n 13, at 21.

<sup>35</sup> Ministry of Justice *Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Harmful Digital Communications Bill* (1 November 2013) at 13.1.

<sup>36</sup> At 2.3.3 – the Attorney-General is required by s 7 of the Bill of Rights to report on any inconsistency.

breached one of the communication principles.<sup>37</sup> A decision under s 7 on the consistency of legislation with the Bill of Rights is not however conclusive and the District Court will still face the question of whether a disclosure order creates minimal interference on the right to freedom of expression.<sup>38</sup>

The judicial assessment of whether a limitation on freedom of expression is demonstrably justified rests upon balancing individual rights against the policy rationale for their restriction.<sup>39</sup> In the context of a disclosure order under s 19 of the HDCA, the Court will need to consider whether the societal interest of accountability for harm outweighs an individual's right to freedom of expression. A limitation on an individual's right to freedom of expression under the HDCA in order to prevent engagement in expressive activities for the purposes of harm is not difficult to justify.<sup>40</sup> The disclosure of an anonymous user's identity is rationally connected to this purpose as it deters harm by holding individual's accountable for their actions or at least creating the threat of doing so. The 'safe harbor' provision for online content hosts included in the HDCA is partially intended to encourage individual authors of online content to take personal responsibility for the content and any consequences it has incurred.<sup>41</sup> Accountability, rather than censorship, is the guiding principle for identity disclosure under the HDCA.<sup>42</sup> A disclosure order is intended to promote personal responsibility and fairness.<sup>43</sup>

The task faced by the Courts is in establishing boundaries around the extent to which an order to disclose an anonymous online speaker's identity can interfere with the right to

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<sup>37</sup> At 14.

<sup>38</sup> Grant Huscroft "The Attorney-General's Reporting Duty" in Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney (eds) *The New Zealand Bill of Rights* (Oxford University Press, Oxford, 2003) at 201.

<sup>39</sup> *R v Hansen* [2007] SC 2007, [2007] 3 NZLR 1 as per Tipping J at [117].

<sup>40</sup> Grant Huscroft "Reasonable Limits on Rights" in Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney (eds) *The New Zealand Bill of Rights* (Oxford University Press, Oxford, 2003) at 172.

<sup>41</sup> (25 June 2015) 706 NZPD 4830.

<sup>42</sup> Law Commission, above n 3, at 37.

<sup>43</sup> (25 June 2015) 706 NZPD 4830.

freedom of expression and this is unprecedented in New Zealand.<sup>44</sup> The right to freedom of expression is one of the most important rights in the Bill of Rights and has been given substantial weight by case law in both New Zealand and the United Kingdom.<sup>45</sup> The court should adopt a stringent approach when considering if it should be overridden. As Tipping J observed in *R v Hansen* “it is instructive and appropriate that our society should be described as both free and democratic”.<sup>46</sup> The law needs to ensure anonymous speakers of simply controversial messages are not unmasked, as highlighted by digital social media site Facebook in its submissions on the HDCA.<sup>47</sup> The balancing exercise required by s 5 of the Bill of Rights should therefore ensure that orders to disclose an online speaker’s identity do not curtail valuable anonymous speech.

### ***III Policy justifications for online anonymous speech regulation***

Anonymity has been identified by the Law Commission as one of the “fundamental human constructs”, alongside privacy, identity and security, that has been impacted by the Internet and forcing society to reconsider their implications.<sup>48</sup> Limitations around free speech established by the law reflect core values held by society.<sup>49</sup> Legal academic Andrew Geddis describes expression as a “social practice” and the boundaries around what a society will tolerate change over time in tandem with shifts in social values.<sup>50</sup> The law should therefore endeavor to reflect the value of anonymity in a contemporary digital environment.

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<sup>44</sup> *Wainwright v Police* [1968] NZLR 101 (SC) as per McCarthy J.

<sup>45</sup> *Police v Campbell* [2010] 1 NZLR 483 (HC).

<sup>46</sup> *R v Hansen*, above n 39, as per Tipping J at [101].

<sup>47</sup> Facebook “Submission to the Justice and Electoral Committee on the Harmful Digital Communications Bill 2014”, at 15.

<sup>48</sup> Law Commission, above n 3, at 1.16.

<sup>49</sup> Law Commission, above n 13, at 22.

<sup>50</sup> Andrew Geddis “The State of Freedom of Expression in New Zealand: an admittedly eclectic overview” (2008) 11 *Otago Law Review* 4 at 559.

## A *Rationales for protection*

Free speech values are an inherent part of the Internet's architecture reflected in features of its design which explicitly foster open discussion and participation.<sup>51</sup> Anonymity on the Internet has been widely identified as a mechanism which enables an individual to realise their right to freedom of expression. Although anonymity is not addressed in the Universal Declaration or in article 19 (1) of the International Covenant on Civil and Political Rights, however the United Nations Office of the High Commissioner said in a report released in May 2015 "anonymity...provide[s] the privacy and security necessary for the exercise of the right to freedom of opinion and expression in the digital age".<sup>52</sup> In the United States, the Supreme Court's ruling that the First Amendment protects speech on the Internet has been extended to circumstances involving anonymous online speakers in the context of court orders for disclosure.<sup>53</sup> The Supreme Court of Canada has exercised a cautious approach to the disclosure of anonymous online speaker's identities on the basis of preventing any unnecessary curtailment of anonymous free speech.<sup>54</sup> The European Court of Human Rights has also recognized online anonymity as important for the exercise of the right to freedom of expression.<sup>55</sup> The right to freedom of expression has been considered in relation to speech on the Internet by the New Zealand Court of Appeal.<sup>56</sup> This paper contends the scope of protection afforded by s 14 should similarly extend to anonymous online speech.

Anonymous online speech attract legal protection by the extent to which it upholds free speech rationales. The importance of freedom of expression in modern society has been

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<sup>51</sup> Law Commission, above n 3, at 7.3.

<sup>52</sup> David Kaye *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* A/HRC/29/32 (2015) at [56].

<sup>53</sup> *Doe v Cahill*, 884 A.2d 4451, 457-58 and *Doe v 2TheMart.com Inc* 140 F. Supp. 2d 1088, 1091-92 (W.D. Wash. 2001).

<sup>54</sup> *R v Spencer* 2014 SCC 43 – in this case struck down the acquisition of an anonymous internet user's identity without a warrant.

<sup>55</sup> In *Financial Times Ltd v United Kingdom* (Application No 821/03, 15 December 2009).

<sup>56</sup> *Murray v Wishart* [2014] 3 NZLR 722 at [141].

traditionally justified by a dominant theory called the ‘marketplace of ideas’. This concept was first articulated by Justice Oliver Wendell Holmes of the US Supreme Court in 1919 who stated the “best test of truth is the power of the thought to get itself accepted in the competition of the market”.<sup>57</sup> The theory describes a metaphorical sphere of public discourse free from government interference within which freedom of expression is a process for identifying the truth.<sup>58</sup> The ‘marketplace of ideas’ theory builds from the long-standing notion that protecting freedom of expression advances discovery and acceptance of the truth.<sup>59</sup> This concept is frequently attributed to John Stuart Mill who posited that open debate and strong argument is the best protection against prejudice.<sup>60</sup>

Anonymous speech was found to be a constitutional right under the First Amendment by the US Supreme Court on the grounds that anonymity encourages speakers to contribute valuable information to the marketplace of ideas.<sup>61</sup> The Court noted that without the ability to be anonymous public discourse would suffer due to individuals refraining from speaking out of fear of social ostracism or a desire to maintain privacy.<sup>62</sup> Anonymous internet speech further broadens the democratic potential of the marketplace of ideas online by enhancing the value of the content of speech through removing associations with identity.<sup>63</sup> This removal of value placed on authorship has also been recognized by jurisprudence in the United States to uphold the truth-seeking value.<sup>64</sup> The Internet generally facilitates the discovery of truth by expanding access to objective information for a wider audience.<sup>65</sup>

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<sup>57</sup> *Abrams v United States*, 260 US 616, 630 (1919) (Holmes J dissenting).

<sup>58</sup> Andrew Nicol, Gavin Millar and Andrew Sharland *Media Law and Human Rights* (2<sup>nd</sup> ed) (Oxford University Press, Oxford, 2009) at 3.

<sup>59</sup> Nicol, Millar and Sharland, above n 58, at 3.

<sup>60</sup> Murchison, above n 5, at 195.

<sup>61</sup> *McIntyre*, above n 1, at 341.

<sup>62</sup> At 342.

<sup>63</sup> Murchison, above n 5, at 193.

<sup>64</sup> *Doe v Cahill*, above n 53.

<sup>65</sup> *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, above n 52, at 7; Lyrisa Lidsky, “Silencing John Doe: Defamation and Discourse in Cyberspace” (2000) 49 *Duke Law Journal* 855 at 894.

The achievement of democratic self-government is another major theoretical basis for protecting freedom of expression, for which open discourse achieved through a marketplace of ideas and the discovery of truth are seen as essential preconditions.<sup>66</sup> There are strong reasons for protecting anonymity in this context. An obvious example is the fundamental criterion that citizens in a democratic election vote anonymously for a free and fair government. The Supreme Court of the United States has adopted a protective stance on anonymity when dealing with anonymous speech used for the purposes of political commentary.<sup>67</sup> Avoiding identification is also essential in activism and governmental whistleblowing to prevent harmful repercussions.<sup>68</sup> Digital activism has become a prominent feature of Internet discourse, much of which is aided by anonymity. A prominent and influential example is WikiLeaks which claims in its mission statement to disseminate important news to the public by providing a secure forum for sources to anonymously leak information.<sup>69</sup> In countries where journalists and activists are persecuted, anonymous Twitter feeds and blogs are relied upon to disseminate information in the public interest such as exposing corrupt political practices of state officials.<sup>70</sup> Anonymity therefore advances the democratic social goal of meaningful participation in democracy by including voices that may not otherwise be heard.

Freedom of expression is frequently posited as an important means of securing individual liberty.<sup>71</sup> The Internet has become a key means for individuals to achieve self-expression

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<sup>66</sup> Lidsky, above n 65, at 894.

<sup>67</sup> *McIntyre*, above n 1; in an online context *Doe v Cahill*, above n 53.

<sup>68</sup> Nathaniel Gleicher “John Doe Subpoenas: Toward a Consistent Legal Standard” (2008) 118 *Yale Law Journal* 320 at 328.

<sup>69</sup> Wikileaks “About” (7 May 2011) <<https://wikileaks.org/About.html>>

<sup>70</sup> Jo Tuckman “Whistleblowers wanted: Mexican journalists seek tips through website” *The Guardian* (online ed, 16 March 2015) - Mexicoleaks, for example, is a digital platform which promises anonymity to its sources and is extensively relied upon by Mexican journalists and activists seeking to expose corruption in their country.

<sup>71</sup> Grant Huscroft “Freedom of expression” in Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney (eds) *The New Zealand Bill of Rights* (Oxford University Press, Oxford, 2003) at 311.

by transforming users into active speakers rather than passive recipients of information.<sup>72</sup> Explicit engagement with the Internet under the cover of anonymity may be the only secure way for individuals to explore and assert aspects of their identity including gender, sexuality, religion, cultural belonging and national origin.<sup>73</sup> The Special Rapporteur identified anonymity as a “leading vehicle for online security” by enabling individuals to exercise their right to freedom of expression without interference.<sup>74</sup> Digital technologies create an unprecedented capacity for interference with the right to freedom of expression with censorship and data collection forcing individual online users to seek secure ways to freely express their opinions.<sup>75</sup> The United States Supreme Court has noted that identification requirements for engaging with speech are intrusive on the rights of the author to determine their own identity through self-expression.<sup>76</sup> In response many anonymous virtual spaces have developed online which enable an author to engage with a chosen audience, controlling the identifying information revealed and free from the scrutiny of both governments and societal norms.<sup>77</sup>

Many groups of Internet users have a legitimate need to hide their identity. Anonymity online offers protection for vulnerable individuals who seek to join supportive online communities without their personal identity being revealed.<sup>78</sup> Women’s Refuge in New Zealand provides victims of domestic violence advice for steps they can take to seek help

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<sup>72</sup> *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, above n 52, at [11].

<sup>73</sup> *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, above n 52, at [12].

<sup>74</sup> *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, above n 52, at [1].

<sup>75</sup> *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, above n 52, at [1].

<sup>76</sup> *McIntyre*, above n 1, at 355 – intrusive because they require authors to reveal “the content of [their] thoughts on a controversial issue” p. 1543, Lidksy and Cotter

<sup>77</sup> Marc Trabsky, Julian Thomas, Megan Richardson “The faulty door of cyberspace and implications for privacy law” (2013) 1 *Law in Context* 13 at 16.

<sup>78</sup> *Citron*, above n 4, at 239.

from their services without being identifiable online.<sup>79</sup> The ability to remain hidden from identification is also fundamentally important for activists and journalists. The Tor network (The Onion Router) which is widely used internationally by journalists and activists offers anonymity by encrypting web traffic and masking IP addresses.<sup>80</sup> In its mission statement the project claims to “advance human rights and freedoms” by supporting an unrestricted availability of online anonymity.<sup>81</sup> The network is used by individuals wanting to protect their sources or those who endeavour to engage in whistleblowing activities while freely maintaining the privacy of their communications to avoid censorship.<sup>82</sup> A threat or compulsion for an anonymous online speaker to disclose their identity may inhibit the willingness of such individuals to contribute to public discourse by providing information and, in extreme cases, may put them at risk of persecution.<sup>83</sup>

When defining the scope of protection afforded by s 14 of the Bill of Rights in the context of a disclosure order under the HDCA, the Courts should therefore consider the extent to which anonymous online speech in a particular circumstance upholds free speech rationales.<sup>84</sup> The value that anonymity grants to the content of speech, rather than the status of the speaker, is a key factor in upholding free speech values.<sup>85</sup> The capacity for an Internet user to disguise their identity and ‘digital footprint’ empowers individuals to freely share opinions and information as well as access the views of others.<sup>86 87</sup> An analysis of the free speech value of anonymous online speech will assist the court in

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<sup>79</sup> Women’s Refuge “Hide my Visit” (10 August 2015) <<https://womensrefuge.org.nz/WR/Legal/Internet-Safety>>

<sup>80</sup> *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, above n 52, at [9].

<sup>81</sup> Tor “About Tor” (17 May 2015) <<https://www.torproject.org/about/overview.html.en>>

<sup>82</sup> James Ball, Bruce Schneier and Glenn Greenwald “NSA and GCHQ target Tor network that protects anonymity of web users” *The Guardian* (online ed, 4 October 2013).

<sup>83</sup> Gleicher, above n 68, at 331.

<sup>84</sup> Huscroft, above n 71, at 311.

<sup>85</sup> Lidsky, above n 65, at 894.

<sup>86</sup> Trabsky, Thomas and Richardson, above n 77, at 3.

<sup>87</sup> Trabsky, Thomas and Richardson, above n 77, at 7; Lidsky, above n 65, at 894.

effectively and consistently balancing the right to freedom of expression against any competing legal interests involved which call for disclosure.

## ***B Rationales for restriction***

Having demonstrated that anonymous online speech can fulfill the rationales for a right to freedom of expression, there must be valid reasons for its restriction.<sup>88</sup> The predominant rationale for restricting anonymous online speech is accountability. Online anonymity is identified by the Law Commission as a dimension of the Internet which exacerbates the harm of damaging online behaviour by endowing the abuser with a sense of being shielded from the “real-life consequences” of their actions.<sup>89</sup> This effect is described by social psychologists as “deindividuation”, where the likelihood of destructive behaviour is increased because individuals are distanced from the effects of their actions by the virtual nature of the technology and avoidance of identification.<sup>90</sup> The open format of the Internet has made the adoption of multiple anonymous identities or profiles a common feature of online discussions.<sup>91</sup> By threatening the removal of the security afforded by anonymity, if such protection of identity is misused, a disclosure order effectively erodes what Justice David Harvey describes as the ‘myth’ of anonymous immunity online.<sup>92</sup>

The credibility of free speech arguments are significantly weakened by internet users who abuse their right to freedom of expression by causing harm to other users.<sup>93</sup> For example the justification of truth is arguably lost when anonymity is used for abusive or indecent speech which contains no beneficial assertions of fact.<sup>94</sup> Anonymity can also deprive an

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<sup>88</sup> Huscroft, above n 71, at 311.

<sup>89</sup> Law Commission, above n 3, at 7.15.

<sup>90</sup> Citron, above n 4, at 58.

<sup>91</sup> Law Commission, above n 3, at 4.147.

<sup>92</sup> David Harvey *Internet.law.nz* (online looseleaf ed, LexisNexis) at [7.5.16].

<sup>93</sup> Law Commission, above n 3, at 7.5.

<sup>94</sup> Nicol, Millar and Sharland, above n 58, at 3.

audience of information which has significant value, for example if the author of the harmful speech was an elected public official then the identity of the speaker may be of public interest.<sup>95</sup> Measures of accountability are therefore seen as necessary in order to secure trust in the marketplace of ideas and further the search for truth by challenging speech which does not serve a social purpose.<sup>96</sup>

The deterrent value of a disclosure order for an anonymous online author's identity is a key justification for the legal mechanism.<sup>97</sup> The underlying rationale is to undermine any encouragement anonymity may afford to further harmful communication.<sup>98</sup> Honourable Amy Adams argues the disclosure orders by the District Court under the HDCA will change online behavior by sending a "clear message" to speakers online that there will be consequences for abusive material.<sup>99</sup> The US Supreme Court has previously given significant weight to the rationale of restricting anonymous speech for the purposes of deterrence of harm, in the context of corrupt financial practices in electoral campaigns.<sup>100</sup> The House of Lords in the United Kingdom has also held orders for disclosing the identity of anonymous sources are necessary on the basis of deterring wrong doing.<sup>101</sup>

Online content hosts are already implementing measures to deter abusive behavior. For example in an effort to minimise abuse on its site Facebook adopted a real-name policy which requires users to register using their 'authentic identity'.<sup>102</sup> The social media network claims this is necessary to foster a culture which deters users who are averse to

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<sup>95</sup> Lyrisa Lidsky and Thomas Cotter "Authorship, Audiences and Anonymous Speech" (2006-2007) 82 Notre Dame L. Rev 1532 at 1545; *McIntyre*, above n 1, the Supreme Court identified an author's identity as content which contributes to the communicative value of that individual's speech.

<sup>96</sup> Murchison, above n 5, at 193.

<sup>97</sup> Law Commission, above n 13, at 17; Law Commission, above n 3, at 7.124.

<sup>98</sup> Yee Fen Lim "Cyberspace Law: commentaries and materials" (Oxford University Press, Melbourne, 2002) at 294.

<sup>99</sup> (25 June 2015) 706 NZPD 4830.

<sup>100</sup> Lidsky and Cotter, above n 95, at 1552; *McConnell v FEC* 540 U.S. 93 (2003) at 143-44.

<sup>101</sup> *Ashworth Hospital Authority v MGN Ltd* [2001] 1 All ER 991.

<sup>102</sup> Submission of Facebook (14 March 2012) at 5, cited in Law commission, above n 13, at 3.31.

using their real names or email addresses.<sup>103</sup> For the shared purpose of deterring abuse, Twitter has recently implemented registration requirements for serial ‘trolls’ and has introduced a policy which forces users of the anonymous TOR network to register their phone numbers.<sup>104</sup>

The legal interest of holding anonymous speakers accountable for speech of a low value such as cyber-harassment is an unalloyed good. In many applications for a disclosure order under the HDCA, accountability will clearly outweigh an individual’s right to freedom of expression. It is important however for the Court to recognize that these rationales sit in tension with an individual’s right to freedom of expression. In order for the HDCA to accommodate the diverse value of anonymous online speech, the court must engage with a balancing exercise under s 5 when making an order for identity disclosure. This will protect anonymous speech that meaningfully upholds free speech values.

#### ***IV Informative experiences in anonymous speech regulation***

The following legal approaches developed with regards to the disclosure of anonymous speaker’s identities in New Zealand and abroad are informative for the application of the HDCA. In this context anonymity has been recognized as an exercise of the right to freedom of expression and considerations taken into account to determine when the protection it affords is lost.

##### ***A The United Kingdom: Norwich Pharmacal Orders***

The *Norwich Pharmacal* order is an equitable remedy developed by the House of Lords in the 1970s which compels a third party to disclose the identifying information of a wrongdoer.<sup>105</sup> The orders are increasingly being adapted in the United Kingdom to compel online content hosts to disclose the identities of anonymous online users without

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<sup>103</sup> Submission of Facebook (14 March 2012) at 5, cited in Law commission, above n 13, at 3.31.

<sup>104</sup> Samuel Gibbs “Twitter’s new bid to end online abuse could endanger dissidents” *the Guardian* (online ed, 4 March 2015) - troll is internet slang for an internet user who is deliberately inflammatory.

<sup>105</sup> *Norwich Pharmacal Co & Ors v Commissioners of Customs and Excise* [1973] 2 All ER 943.

these hosts attracting liability. For example in *G & G v Wikimedia Foundation Inc*, the court granted a *Norwich Pharmacal* order to disclose the identity of an anonymous user of Wikipedia who had allegedly posted private and confidential information about the claimant in a Wikipedia article.<sup>106</sup> In *Applause Store Productions Ltd v Raphael*, Facebook was similarly compelled under an order to disclose the registration details, email addresses and IP addresses of the alleged respondent.<sup>107</sup>

The orders are theoretically available as a legal avenue to unveil an anonymous online author's identity in New Zealand and barrister John Katz observes in the context of intellectual property law that they are an effective course of action for obtaining the identity of offenders who seek protection behind contractual agreements with ISPs and other content hosts.<sup>108</sup> There is however very little precedent of the remedy being used in New Zealand.<sup>109</sup> The Employment Court has previously issued a *Norwich Pharmacal* order under the guise of pre-commencement discovery law to an Internet Service Provider (ISP) for obtaining the identity of an anonymous account holder who was claimed to be the author of an offensive email.<sup>110</sup> The judge observed that three conditions must be met before an order is made: first, there must have been a wrongful act, second, no action can commence against the wrongdoer without the discovery of the information and third, the third party was not involved in the wrongdoing.<sup>111</sup> This case demonstrates however that *Norwich Pharmacal* orders will not be effective in the context of the HDCA because issues regarding the right to freedom of expression are not taken into account.

*Norwich Pharmacal* orders have been questioned in terms of a lack of safeguards around the disclosure of an anonymous speaker's identifying information which creates potential

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<sup>106</sup> *G & G v Wikimedia Foundation Inc* [2009] EWHC 3148 (QB).

<sup>107</sup> *Applause Store Productions Ltd v Raphael* [2008] EWHC 1781 (QB), [2008] Info TLR 318 (24 July 2008)

<sup>108</sup> John Katz, "Norwich Pharmacal Orders 35 Years On" 5 NZIPJ 610 (2010).

<sup>109</sup> John Katz, above n 108.

<sup>110</sup> *A v The Internet Company of New Zealand* [2009] ERNZ 1.

<sup>111</sup> *A v The Internet Company of New Zealand* at [9].

difficulties, for example applicants may not have a direct legal interest in disclosure.<sup>112</sup> In the House of Lords decision *British Steel Corporation v Granada Television Ltd*, Lord Templeman stated that the principle of *Norwich Pharmacal* applies “whether or not the victim intends to pursue action in the courts against the wrongdoer provided that the existence of a cause of action is established and the victim cannot otherwise obtain justice”.<sup>113</sup> This approach was upheld in *Totalise Plc v The Motley Fool Ltd* where the court rejected the defendant’s argument that the discretion to order the disclosure of an identity should not be exercised unless the plaintiff had a clear intention to bring proceedings against the author.<sup>114</sup> The court held Totalise had a right to know the identity of the author to then assess the best course of legal action.<sup>115</sup> When applying for a *Norwich Pharmacal* order it is therefore not necessary for the plaintiff to plead a full statement of claim and the orders can be made simply to establish the viability of a cause of action, regardless of whether alternative options are available for obtaining the information.<sup>116</sup>

Concerns have been expressed about the extent to which *Norwich Pharmacal* orders adequately take into account the competing legal interests which underlie an order to disclose a speaker’s identity.<sup>117</sup> The orders have been criticized for failing to establish a threshold which protects an individual’s right to freedom of expression in circumstances where anonymous speech serves a public interest.<sup>118</sup> This is most notable in the context of journalist source protection. The House of Lords used a *Norwich Pharmacal* order in *British Steel Corporation v Granada Television* to compel a journalist to disclose the identity of their confidential source.<sup>119</sup> The European Court of Human Rights held in

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<sup>112</sup> James Tumbridge “Media CAT scratches the Norwich Pharmacal Order” (2011) *Convergence* 1 2011.

<sup>113</sup> *British Steel Corporation v Granada Television Ltd* [1981] 1 All ER 417 at 443.

<sup>114</sup> *Totalise v Motely Fool Limited* [2002] FSR 50.

<sup>115</sup> Harvey, above n 92, at 7.5.16.

<sup>116</sup> John Katz, above n 108.

<sup>117</sup> *BMG Canada v John Doe and Jane Doe* (2005) 252 DLR (4<sup>th</sup>) 342.

<sup>118</sup> Stuart Wallace, “the Journalist-source relationship in context: a comparative review of US and English Law” (2009) 38 *Comm. L. World Rev.* 268 at 273.

<sup>119</sup> *British Steel Crpn v Granada Television Ltd*, above n 113.

*Financial Times Ltd v The United Kingdom* that the use of a Norwich Pharmacal order for the disclosure of an anonymous source to journalists is incompatible with the right to freedom of expression embodied in Article 10 of the European Convention, which can only be restricted to the extent necessary to uphold a democratic society.<sup>120</sup> The European Court directed that the factors taken into account must include whether there is sufficiently clear evidence to demonstrate that disclosure of an identity was necessary to prevent further dissemination of confidential information and to recover damages.<sup>121</sup> Prevention of a future breach was insufficient to warrant disclosure.<sup>122</sup> In New Zealand, as discussed in the following section, it was observed in *Police v Campbell* involving the protection of journalist sources, that *Norwich Pharmacal* orders were an example of the common law falling short of protection.<sup>123</sup>

*Norwich Pharmacal* orders should not be relied upon as an analogous precedent for disclosure orders made under the HDCA as they fail to adequately balance the competing legal interests involved. As the Ontario Court of Appeal has observed “the *Norwich* order...is an intrusive and extraordinary remedy that must be exercised with caution”.<sup>124</sup>

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<sup>120</sup> *Financial Times Ltd*, above n 55 - the United Kingdom is party to the European Convention on Human Rights which is incorporated into domestic law in the Human Rights Act 1998 and has bound courts to apply law in a way which complies with its terms.

<sup>121</sup> *Financial Times Ltd*, above n 55.

<sup>122</sup> *Goodwin v the United Kingdom*, 27 March 1996, Reports of Judgments and Decisions 1996-II.

<sup>123</sup> *Police v Campbell*, above n 45, at [50].

<sup>124</sup> *GEA Group AG v Ventra Group Co* 2009 ONCA 619.

## ***B New Zealand: Journalist Source Protection***

The law surrounding the protection of journalist's sources deals with issues concerning the disclosure of an otherwise anonymous speaker's identity. Journalists hold a unique position when faced with a legal obligation that risks disclosure of the identity of a source which conflicts with their promise of anonymity to that source.<sup>125</sup> This relationship between journalists and confidential sources is protected by statute under section 68 of the Evidence Act 2006 in recognition of the freedom of the press.<sup>126</sup> Anonymous speech is a much broader category, valuable in vastly different ways depending on the context and the speaker. The process engaged with by the courts for regulating the disclosure of a speaker's identity in this area of law has value for considering an application for an order to disclose an anonymous author's identity under the HDCA, particularly in light of the Bill of Rights.

The law presumes non-compulsion for journalists where, if confidentiality was promised to a source, there is a risk of disclosure of their identity.<sup>127</sup> This protection is limited to the information which would disclose the identity of the source and does not extend to the content of the engagement between an informant and journalist.<sup>128</sup> It is a qualified protection with courts empowered to ultimately compel journalists to reveal their sources when a greater public interest is identified in disclosure.<sup>129</sup> The presumption of immunity can therefore be displaced by an order under s 68(2).

The legislation requires the public interest in identifying a source be weighed against a likely "adverse effect" of disclosure of the individual's identity and the competing

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<sup>125</sup> John Burrows and Ursula Cheer *Media Law in New Zealand* (6<sup>th</sup> ed, LexisNexis, Wellington, 2010) at [13.4.1].

<sup>126</sup> Wallace, above n 118, at 269.

<sup>127</sup> Section 68.

<sup>128</sup> *Police v Campbell*, above n 45, at [84]

<sup>129</sup> Burrows and Cheer, above n 125, at [13.4.1].

interest of the public knowing the information they communicated.<sup>130</sup> Justice Randerson’s interim judgement in *Police v Campbell* is informative for its interpretation of the balancing exercise required of the court when considering an application for an order under s 68 (2).<sup>131</sup> In this case the public interest in identifying the source was the investigation and prosecution of crime.<sup>132</sup> This exercise involves weighing the competing legal interests involved in the particular case and considering the protection afforded to freedom of expression by s 14 of the Bill of Rights.

Rather than a conventional discretionary exercise, this process was held to be an evaluation of fact and degree.<sup>133</sup> The judge argued it would be adding a “gloss to the words of the statute” to establish a set threshold of unusual or exceptional circumstances for overriding the qualified protection.<sup>134</sup> The balancing of different factors involved in an application was held to be sufficient. Factors taken into account in this assessment include whether alternative means of obtaining the information were available, the importance of the information for the prosecution’s case and the seriousness of the charge and the public interest in disclosure.<sup>135</sup> The necessity of the informant’s identity to the prosecution’s case is considered alongside the mandatory factors in s 68 (2) and (5). These factors are similar to the considerations assessed in the United Kingdom.<sup>136</sup>

After accepting evidence about the difficulty of empirically assessing a chilling effect on speech resulting from disclosure, the judge observed if there is a low threshold for a high frequency of court-ordered disclosures and the orders attract a high level of publicity, the greater the risk of a chilling effect.<sup>137</sup> Academic Ursula Cheer observes that the European

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<sup>130</sup> Evidence Act, s 68 (2) (a) and (b).

<sup>131</sup> *Police v Campbell*, above n 45, at [89] Randerson J held the word “outweighs” indicates the Court must conduct a balancing exercise.

<sup>132</sup> At [72].

<sup>133</sup> At [90].

<sup>134</sup> At [91].

<sup>135</sup> *Police v Campbell*, above n 45, at [96]-[99].

<sup>136</sup> Ursula Cheer “Compelling Journalists To Disclose Sources: Two Recent Decisions from Europe and New Zealand” (2010) 2(1) *Journal of Media Law* 15-23 at 21.

<sup>137</sup> *Police v Campbell*, above n 45, at [49].

Court of Human Rights gave greater weight to predictions about chilling effects in the same context.<sup>138</sup>

While the Court is specifically required to consider the Bill of Rights when making an order to disclose an anonymous speaker's identity under the HDCA, *Police v Campbell* only briefly considers the Bill of Rights.<sup>139</sup> John Burrows and Ursula Cheer note that the case acknowledges s 14 as the presumptive starting point of the balancing exercise involved rather than a criterion to be taken into account.<sup>140</sup> The same presumption should operate in the context of discovering the identity of an anonymous online speaker. Justice Randerson's analysis of the balancing test required under s 68 is informative and valuable in the context of the HDCA in terms of the considerations that are taken into account when determining the appropriate weight that should be given to the legal interest in disclosure of an anonymous speaker's identity.

### ***C The United States: John Doe Subpoenas***

The First Amendment of the United States Constitution is often referred to in New Zealand when considering the scope of protection afforded by the right to freedom of expression.<sup>141</sup> The Supreme Court of the United States has long established that the First Amendment encompasses a right to speak anonymously, observing that anonymous media such as books and political pamphlets have played "an important role in the progress of mankind".<sup>142</sup> Recently the question of whether and to what extent anonymous speech should be protected in the context of digital communications has gained greater urgency with an increase of applications for "John Doe" subpoenas to disclose

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<sup>138</sup> Cheer, above n 136, at 19.

<sup>139</sup> Harmful Digital Communications Act, s 19 (6).

<sup>140</sup> Burrows and Cheer, above n 125, at [15.2.3].

<sup>141</sup> Huscroft, above n 40, at 170.

<sup>142</sup> *Talley v California* 362 U.S. 60 (1960) at [3] 449.

anonymous speaker's identities.<sup>143</sup> This increase is partially attributable to the safe harbor provision in the Communications Decency Act which protects online content hosts and ISP's from liability, meaning that claims can only be directly brought against the individual author of the harmful material online.<sup>144</sup> In civil cases the identity of the author must also be determined for a successful legal claim.<sup>145</sup> American legal academic Lyrrisa Lidsky observes that many recent claims for exposing the identity of an anonymous online speaker are purely symbolic, with the threat of exposure intended to silence other speakers or critics.<sup>146</sup> A sizeable body of case law has emerged in the United States which grapples with the challenges these subpoenas pose to the fundamental right to freedom of expression.

### *1 A balanced standard*

In the United States to date, no prevailing standard for the disclosure of an anonymous online speaker's identity has been developed by a federal circuit court or the Supreme Court.<sup>147</sup> In *Solers, Inc v Doe* it was observed that "one size does not necessarily fit all" for a test to expose anonymous speakers.<sup>148</sup> A universal standard is difficult to establish because of the diversity of online anonymous speech.<sup>149</sup> As a result a spectrum of legal standards for the discovery of anonymous online speaker's identities has emerged.<sup>150</sup> The emergence of such a variety of tests reflects the challenges faced when required to balance the legal interests involved in cases dealing with anonymous online speech.<sup>151</sup>

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<sup>143</sup> Murchison, above n 5, at 187 - "John Doe" is a generic term used in the United States to name a party that cannot be identified in a legal action.

<sup>144</sup> Communications Decency Act (47 U.S.C 230 (c)(1)(2006)

<sup>145</sup> *Columbia Ins. Co v seescandy.com* 185 F.R.D. 573, 573 (N.D. Cal. 1999)

<sup>146</sup> Lidsky, above n 65, at 860.

<sup>147</sup> Jocelyn Hanamirian "The Right to Remain Anonymous: Anonymous Speakers, Confidential Sources and the Public Good" (2011-2012) 35 Colum. J. L. & Arts 119 at 126.

<sup>148</sup> *Solers v Doe* 977 A.2d 941, 952 (D.C. 2009).

<sup>149</sup> Murchison, above n 5, at 190.

<sup>150</sup> Murchison, above n 5, at 187.

<sup>151</sup> Lidsky and Cotter, above n 95, at 1595.

A “John Doe” subpoena in this context raises two important questions, the first concerning the scope of First Amendment protection over anonymous online speech and the second concerning what requirements must be met for an application for a discovery order to be successful.<sup>152</sup> There have been courts which do not consider anonymous online speech as deserving any protection.<sup>153</sup> Most courts however have sought to develop a legal standard of disclosure which protects valuable anonymous speech yet simultaneously allows for measures of accountability.<sup>154</sup> The standards most relevant to the application of the HDCA in New Zealand are those developed in the cases *Dendrite International Inc v Doe*<sup>155</sup> and *Doe v Cahill*<sup>156</sup> which directly deal with the task of balancing anonymous speech as an exercise of freedom of speech against providing individuals harmed by such speech with effective redress according to a constitutional framework.<sup>157</sup>

(a) *Dendrite International Inc v Doe: a balancing test*

*Dendrite International Inc v Doe* adopted and expanded the “motion to dismiss” standard, which required the plaintiff to provide notice to the defendant and demonstrate the application would survive a request by the defendant to dismiss the case, to include an explicit balancing test which assessed the strength of the plaintiff’s case against the value of preserving the defendant’s anonymity.<sup>158</sup> The case was considering allegedly defamatory anonymous comments posted on a Yahoo! Message board.

Legal scholars in the United States are divided over the desirability of the *Dendrite* balancing test. Academics Lidsky and Cotter argue it is a necessary step to ensure the

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<sup>152</sup> *Doe v 2theMart.com*, above n 53, at 1091.

<sup>153</sup> Lidsky and Cotter, above n 95, at 1595.

<sup>154</sup> Murchison, above n 5, at 190.

<sup>155</sup> *Dendrite International v Doe*, 775 A.2d 756, 760-61.

<sup>156</sup> *Doe v Cahill*, above n 53.

<sup>157</sup> Sophia Qasir “Anonymity in Cyberspace: Judicial and Legislative Regulations” (2012-2013) 81 Fordham L. Rev. 3651 at 3680.

<sup>158</sup> Hanamirian, above n 147, at 124.

defendant's right to speak anonymously is not readily compromised.<sup>159</sup> Others argue the balance inherent in the good-faith standard is sufficient.<sup>160</sup> Legal academic Brian Murchison argues the test is 'unwise' and fundamentally problematic because of the difficulty in calculating the value of anonymous speech in comparison with its harm and this ambiguity may dissuade plaintiffs from litigation.<sup>161</sup>

*(b) Doe v Cahill: a summary judgement standard*

This case is particularly notable because it was the first instance where a State Supreme Court considered the issue of preventing trivial claims which would chill speech.<sup>162</sup> In this case a city councilman obtained a court order for the disclosure of an anonymous blogger's identity for allegedly defamatory statements posted by the blogger on an internet blog. Upon being notified by the content host of the order, the defendant filed for a motion to prevent disclosure of his identity. After applying a good faith standard, whereby a subpoena is granted if the complainant demonstrates a good-faith belief the information is necessary for their claim, the judge rejected the request for a protective order.<sup>163</sup> On appeal the Delaware Supreme Court reversed this decision on the grounds that the good faith standard was insufficiently protective of the blogger's right to speak anonymously as protected by the First Amendment.<sup>164</sup> Anonymous online speakers would not be protected against gratuitous lawsuits brought solely for symbolic purposes.<sup>165</sup> The court observed that internet speech is often anonymous and while there are certain classes of anonymous speech which negate the entitlement to First

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<sup>159</sup> Lidsky and Cotter, above n 95, at 1596.

<sup>160</sup> Michael S. Vogel, "Unmasking "John Doe" Defendants: the Case against Hand-Wringing over Legal Standards" (2004) 83 Or. L. REV 795, 854-44 at 855.

<sup>161</sup> Murchison, above n 5, at 192.

<sup>162</sup> *Doe v Cahill*, above n 53, at 457.

<sup>163</sup> At 457.

<sup>164</sup> *Doe v Cahill*, above n 53, at 454.

<sup>165</sup> At 457.

Amendment protection there is an imperative to adopt a strict standard which would prevent any chill of online users exercising their right to speak anonymously.<sup>166</sup>

The court proceeded to establish a demanding standard whereby the plaintiff is required to satisfy a “summary judgment” standard before the identity of an anonymous defendant can be obtained.<sup>167</sup> This standard requires the plaintiff to: (1) provide the anonymous speaker with notice that disclosure of their identity is being sought and a reasonable opportunity to respond, and (2) demonstrate certainty in the material facts of the case and that the disclosure of the identity is necessary as a matter of law. The fact that this case involved political speech and a public figure was specifically taken into account in reaching this decision.<sup>168</sup> An explicit balancing test, such as that adopted in *Dendrite*, was rejected on the basis that “the summary judgment test is itself the balance”.<sup>169</sup>

## 2 *Lessons for New Zealand*

In considering the applicability of the experience in the United States to New Zealand’s application of the HDCA, the balancing exercise in *Dendrite*, which *Cahill* builds from, is informative in a New Zealand context because the application of s 5 of the Bill of Rights involves a similar balancing exercise.<sup>170</sup> Case law interpreting s 5 of the Bill of Rights overwhelmingly prefers a balancing approach with formulaic tests rejected on the basis of being unlikely to produce a predictable or certain result and difficult to apply in circumstances involving conflicting legal interests which vary from case to case.<sup>171</sup> The standard in *Doe v Cahill* is increasingly being used by US courts on the grounds that it ensures protection of online anonymity against gratuitous claims and has been

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<sup>166</sup> *Doe v Cahill*, above n 53, at 457.

<sup>167</sup> At 457.

<sup>168</sup> At 464.

<sup>169</sup> *Dendrite*, above n 155, at 461.

<sup>170</sup> Huscroft, above n 40, at 172.

<sup>171</sup> Huscroft, above n 40, at 174.

recommended as the standard which should be adopted by the government.<sup>172</sup> Lidsky and Cotter argue that the standard in *Doe v Cahill* is a “good point of departure” for developing a uniform judicial legal framework.<sup>173</sup> The decision is therefore important for the context of the HDCA for its endeavor to strike an appropriate balance between protecting anonymous speakers and providing access to justice for those harmed by anonymous speech.<sup>174</sup>

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<sup>172</sup> Citron, above n 4, at 223.

<sup>173</sup> Lidsky and Cotter, above n 95, at 1596.

<sup>174</sup> *Doe v Cahill*, above n 53, at 465.

## V *Recommendations for a comprehensive legal approach: striking a balance*

To ensure orders for the disclosure of an anonymous online speaker's identity under the HDCA are consistent with the Bill of Rights, the Court should adopt a legal approach which considers the scope of protection afforded by s 14 of the Bill of Rights to extend over anonymous online speech. The Court should then engage with a balancing exercise to determine whether a legal interest in disclosure outweighs this protection.<sup>175</sup> This approach would be consistent with judicial experience concerning disclosure orders in the context of journalist source protection in New Zealand, which has engaged with a similar balancing exercise, and in the United States where there is an increasing concern to engage with a contextual analysis of the desirability of a disclosure order to ensure anonymous online speech is protected in circumstances of value.

A significant proportion of the speech which comes before the Court will not be worthy of protection however the presumption of protection ensures due weight is given to the right to freedom of expression by the Court when exercising its discretion and ensures valuable speech is not curtailed. A contextual analysis can be effective in both straightforward cases and those that require a higher threshold of protection when valuable speech is involved therefore the policy motivation of the HDCA to hold individuals accountable for their speech will not be undermined.<sup>176</sup> In the context of journalist source protection, the New Zealand Supreme Court in *Brooker v Police* perceived the decision to disclose an anonymous source's identity as circumstantial and based upon all relevant considerations in an individual case.<sup>177</sup> The statutory considerations set out in s 19 (5) of the HDCA for the Court to take into account when exercising its discretion also appear to indicate a fact-specific approach is preferred in this context.<sup>178</sup>

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<sup>175</sup> Huscroft, above n 40, at 172

<sup>176</sup> *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [90].

<sup>177</sup> *Brooker v Police*, above n 176, as per Richardson J at [59] and Tipping J at [91].

<sup>178</sup> *Police v Campbell*, above n 45, at [94].

A particular concern for the Courts interpreting s 68 (2) of the Evidence Act and the Courts in the United States was the potential for an insufficiently protective balancing process to chill valuable anonymous speech. The likelihood of a chilling effect could be considered when the court is assessing the degree to which an anonymous communication is in the public interest as required by s 19 (5) (g) of the HDCA.<sup>179</sup> The High Court accepted evidence in *Police v Campbell* that if the frequency of court orders to disclose a speaker's identity is low the risk of a chilling effect on anonymous speakers is diminished.<sup>180</sup> The United States has however experienced a rise in applications for the disclosure of anonymous authors of digital communications after the implementation of section 230 (c) (1) which protects online content hosts from legal action and shifts liability to the individual internet user.<sup>181</sup> The introduction of a similar provision in the HDCA, coupled with the breadth of the communication principles and prevalence of anonymity online, creates a potential for applications for disclosure orders to be relatively high. The communication of information in the public interest, such as a wrongdoing by a public official, could be deterred by the threat of disclosure of the speaker's identity.<sup>182</sup> Anonymous online speakers could also censor their speech if disclosure of their identifying details would have a likely adverse effect on them, such as by revealing sensitive personal information.<sup>183</sup>

The following considerations should also be taken into account for the court's decisions to adequately consider whether a legal interest in disclosure rebuts the presumption of protection under s 14. The presence of s 20 in the HDCA which enables the court to vary an order appears to grant a discretion which extends beyond s 19 (5) to take into account other relevant factors.<sup>184</sup> The current judicial climate in the United States indicates a growing consensus among the Courts that a John Doe subpoena requires providing notice

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<sup>179</sup> Harmful Digital Communications Act 2015, s 19 (5)(g).

<sup>180</sup> At [114].

<sup>181</sup> Laura Rogal "Anonymity in Social Media" (2013) 7 Phoenix Law Review 61 at 72.

<sup>182</sup> *Doe v Cahill*, above n 53, at 457.

<sup>183</sup> *Police v Campbell*, above n 45, at [100].

<sup>184</sup> *Police v Campbell*, above n 45, at [102] – s 19 (2) "may, on an application"

to the defendant and a strong argument presented by the plaintiff.<sup>185</sup> In *Police v Campbell*, Randerson J considered the significance of disclosing the speaker's identity for the prosecution's case alongside the required statutory criteria.<sup>186</sup> This consideration is particularly salient in the context of the HDCA as alternative remedies are open to potential plaintiffs which may make a disclosure order unnecessary.<sup>187</sup> For example under the HDCA the content complained of may have already been taken down by an online content host under an order by the District Court.<sup>188</sup> If the identifying details are of crucial importance to the prosecution case, then greater weight should be given to the legal interest in disclosure.<sup>189</sup> In order to protect valuable speakers however, the court should adopt a legal approach which requires disclosure to be important to the plaintiff not merely desirable.<sup>190</sup>

A balancing exercise which determines whether the legal interest in disclosure outweighs that of the individual's right to freedom of expression would effectively respond to the spectrum of anonymous online speech that will be challenged before the District Court under the HDCA. This approach would ensure against valuable anonymous online speech being gratuitously curtailed while continuing to hold individuals who engage with speech of a low value to account.

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<sup>185</sup> Gleicher, above n 68, at 339; Lidsky and Cotter, 1595.

<sup>186</sup> *Police v Campbell*, above n 45, at [96]-[99].

<sup>187</sup> *Police v Campbell*, above n 45, at [97] – this was a factor taken into account. The take down of content can be ordered under s 19 (1) of HDCA.

<sup>188</sup> Harmful Digital Communications Act, s 19 (1) (a).

<sup>189</sup> *Police v Campbell*, above n 45, at [97].

<sup>190</sup> *Police v Campbell*, above n 45, at [97].

## **VI Conclusion**

The ubiquity and ease of anonymity online has become a fundamental feature of Internet discourse. Although frequently identified as a characteristic of digital communication which facilitates and encourages cyber-abuse, this paper demonstrates that speaking anonymously online is nevertheless an exercise of an individual's fundamental right to freedom of expression. The security of anonymity can be utilized in meaningful ways, including the empowerment of ordinary individuals to voice their views and opinions on matters of public importance and to afford protection to vulnerable speakers.

An order to disclose an anonymous online author's identity under the HDCA is a measure intended to deter harmful digital communications by holding individuals accountable for their speech. The necessity of disclosure of the identity of an anonymous online speaker who has engaged in speech of a low societal value, such as harassment, is not questioned by this paper. The legislation is however structured around a broad set of principles which creates a high likelihood that the District Court will be required to consider applications for disclosure orders which involve core speech.

The New Zealand courts must adopt a legal approach for granting the orders which adequately accounts for the diversity of anonymous online speech and recognizes that it attracts the protection of s 14 of the Bill of Rights as an exercise of an individual's right to freedom of expression with the protection potentially lost when there is a greater interest in holding individuals accountable for any harm caused by the speech. A balancing exercise based upon an established set of considerations will ensure the law is consistently applied and that disclosure orders are a demonstrably justified limitation of this right to freedom of expression. When making an order the court is required to exercise its discretion according to the statutory criteria outlined in s 19 (5), however there are additional considerations that should be taken into account to determine whether and to what extent an anonymous speaker's right to freedom of expression should be curtailed in light of other interests.

In light of the contemporary digital communications environment, the law should be cautious in its treatment of online anonymous speech and develop a framework that accounts for its diversity to ensure it is appropriately protected in circumstances of value. Anonymous online speech should not be exclusively considered in terms of the role it can have in spreading harm but should also be recognized for its potential to enrich society through empowering the means for sharing valuable information and facilitating acts of meaningful expression.

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