Defamation in the Internet Age—Have You Been SLAPP-ed?©

In 2006, 83-year-old Alaska Senator Ted Stevens famously described the Internet as "a series of tubes."[1] Although the late senator is still fodder for television comics, warp-speed changes in ubiquitous electronic media have left even members of the Facebook Generation struggling to keep up. Electronic speech in e-mail, blogs, Twitter, and "Yelp!" reviews pervades our lives like a virus. Even in our sleep, Internet speech affects what we wear and eat, what we think, how world leaders make decisions, and even who those leaders are. Barack Obama's 2008 election is attributed to his superior use of electronic media.[2] Disturbingly, the gruesome knife-beheadings of American journalists by taunting ISIS terrorists is also likely attributable to their certainty that viral transmission of the grotesque videos on You-Tube would give them *planetary* shock value. There always seems to be a serpent in the Garden.

The Dark Side of Free Speech Is Nothing New

Some argue the Founding Fathers would never have condoned First Amendment protection for *Hustler Magazine's* ad parody of Jerry Falwell confessing that his first time having sex was with his own mother, drunk in an outhouse.[3] They are wrong. The right to speak hurtfully about public figures was used by the Founding Fathers themselves with relish—on each other. In the election of 1800, a political opponent wrote that president John Adams was "old, querulous, bald, blind, crippled, [and] toothless."[4] An operative hired by Adams' opponent Thomas Jefferson added:

> **John Adams is a hideous hermaphroditical character with neither the force and firmness of a man, nor the gentleness and sensibility of a woman.**[5]

Adams then called Jefferson "a mean-spirited, low-lived fellow, the son of a half-breed Indian squaw, sired by a Virginia mulatto father."

Speech can comfort the afflicted as well as afflict the comfortable. It was ever so. Jerry Falwell was not the first stuffed shirt to be deflated in the media. He will not be the last. Only the media are constantly changing.

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1 "[T]he Internet is not something that you just dump something on. It's not a big truck. It's a series of tubes. And if you don't understand, those tubes can be filled and if they are filled, when you put your message in, it gets in line and it's going to be delayed by anyone that puts into that tube enormous amounts of material." Singel, Ryan; Poulsen, Kevin (June 29, 2006) "*Your Own Personal Internet*," www.wired.com, last accessed August 31, 2014. [Emphasis added.]

2 *See* Stirland, Sarah Lai, (November 4, 2008) "*Propelled by Internet, Obama Wins the Presidency*," www.wired.com, last accessed August 31, 2014.

3 The U.S. Supreme Court unanimously reversed a jury award in favor of the much-admired minister, declaring *Hustler's* ad parody to be protected speech about a public figure. ***Hustler Magazine, Inc. v. Falwell***, 485 U.S. 46, 48 (1988).

4 McCullough, David, ***John Adams***, p. 500, quoting a letter from Abigail Adams.

5 Swint, Kerwin, "Founding Fathers' Dirty Campaign," CNN Living, August 22, 2008.

Modern Legal Problems of Free Speech and Defamation

In the 20th century, courts sometimes struggled with the boundaries of First Amendment protection in ways that looked sadly comical even at the time. After Potter Stewart famously wrote that he could not define pornography but, "I know it when I see it,"[6] the U.S. Supreme Court met in the basement for awkward movie nights, watching the improbable escapades of *Lesbian Nymphomaniacs* and other films to decide if they contained "redeeming social value." Subtly mocking Stewart, law clerks would sometimes cry out in the darkness, "I can see it!" John Marshall Harlan was nearly blind at the time and could not see the films, so Thurgood Marshall gleefully narrated the clips for him.[7]

In the 21st century, the law of defamation is no longer in flux, but a new species of legal predator has evolved from the Internet's DNA and now quietly swims the electronic seas in search of prey. The web's free access, unprecedented reach, and the extraordinary ability of its users to speak anonymously have created a torrential flood of electronic speech on an endless variety of topics. Anonymity removes inhibitions that traditional social standards may impose in other contexts, so Internet rhetoric may be coarser, meaner, and more hyperbolic. However, it is *no less constitutionally protected*. In 1997, the U.S. Supreme Court wrote:

> **Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.**[8]

When an Internet "pamphleteer" reaches millions of people with a single "Tweet" or blog posting, he risks offending far more people than a town crier walking near Boston's Old North Church in 1776. Like Jerry Falwell after reading that his mother "looked better than a Baptist whore with a $100 donation," angry targets of vulgar Internet mockery and denunciation may sue the Tweeters and bloggers for it—especially if the targets are wealthy and powerful. Thus, the giant Internet-spawned shark of which free-speechifiers are now a plentiful supply of victims is called a "SLAPP suit," an acronym for "Strategic Lawsuits Against Public Participation." It has turned the waters red with blood.

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6 ***Jacobellis v. Ohio***, 378 U.S. 184, 197 (1964) regarding possible obscenity in *The Lovers*.

7 Tribe, Laurence, and Matz, Joshua, "*Uncertain Justice: The Roberts Court and the Constitution*," ch. 4.

8 ***Reno v. ACLU***, 521 U.S. 844, 870 (1997).

What Is a SLAPP Suit?

A SLAPP suit is brought not because the plaintiff seeks compensation for an injury, but to chill the exercise of free speech—by exploiting the speaker's fear of having to defend *even a frivolous suit*. Often no attempt is ever made to serve the defendant with process (which would trigger duties on the *plaintiff's* part). Of course, the pleadings are usually sent to the defendant *informally* so he knows he has been sued. Often "emergency" injunctive relief is sought even before the defendants learn the suit has been filed.[9] Sometimes multiple SLAPP-suits are filed simultaneously in different courts—by the *same* plaintiff making the *same* allegations against the *same* defendants.

A typical SLAPP suit alleges that the defendant's Internet comments have defamed him and intentionally inflicted emotional distress, but angry plaintiffs may also claim business disparagement, tortious interference, fraud, conspiracy, and even "harassment" and "electronic stalking." The fact that a claim is not a recognized civil cause of action does not deter a SLAPP-suit plaintiff—he desires to create fear, not survive appellate review. And SLAPP suits are not limited to electronic speech. There are even cases based on speech in Halloween decorations—quarreling neighbors who decided to mock each other on fake front-yard tombstones literally made a "federal case" out of the free-speech ramifications of their comical public barbs.[10] (The speech was protected.)

Plaintiffs often drop their SLAPP suits when a defense lawyer appears. Even though "nonsuiting" technically does not purge the offender's violation of pleading rules, judges are nevertheless loath to punish a plaintiff who unilaterally disarms. Of course, by that time, the damage is done. The defendant has paid a lawyer to defend, but is deprived of his day in court. Thus, SLAPP-suit plaintiffs have evolved a useful technique to create the false impression that they are benign—rather like a Texas 'possum "playing dead." The SLAPP-suit plaintiff nonsuits, re-files his SLAPP-suit in a different court, and begins the process anew.

This author's last SLAPP-suit defense *before* adoption of the new statute discussed below was a two-year odyssey for the individual bloggers ending in the Texas Supreme Court. Although successful, the victory was Pyrrhic. There was no vehicle for the clients to recover their $250,000.00 in attorney's fees from the soundly-rebuked plaintiff. *See* ***In re Does 1 and 2***, 337 S.W.3d 832 (Tex. 2011) (orig. proceeding). But all this changed in 2011.

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[9] Called "*ex parte*" relief, such injunctions often operate as illegal, content-related prior restraints on speech, but are granted by busy judges anyway because the other side is not present in court to argue against them.

[10] ***Purtell v. Mason***, 527 F.3d 613 (7th Cir. 2008); *see also* ***Salama v. Deaton***, 10-CA-00310 (Fla. 13th Cir. Ct.).

What You Can Do <u>Now</u> If You Get SLAPP-ed

By 2011 when ***In re Does 1 and 2*** was decided, the use of SLAPP suits to squelch public criticism had reached such a fever pitch in Texas that the Legislature adopted the Citizens Participation Act ("TCPA") by a unanimous vote in both houses. To date, 28 other states and the District of Columbia have also adopted anti-SLAPP statutes. At just over three years old, the TCPA is only a toddler, but it is performing under appellate review like an Olympic gold medal gymnast. Decisions under the TCPA are exploding out of the courts of appeals like popcorn kernels in a microwave—in part because of the statute's provision allowing immediate, *accelerated* appeal of any trial court decision that allows a SLAPP suit to continue.

In a brief this firm filed in a TCPA case in August 2014, we cited fifteen TCPA appeals decided within just the previous twelve months—and several of those had come down only weeks before. No other statute or issue has generated this volume of decisional law in so short a period. It appears no appellate court has yet reversed a trial court for *dismissing* a SLAPP suit—they have all either upheld dismissal or reversed the trial court for *failure to dismiss*. The Texas statute may be the most powerful anti-SLAPP statute yet enacted in any jurisdiction. Here are seven reasons why. The TCPA:

(i) Requires dismissal of the suit on the defendant's motion unless the plaintiff brings forth "clear and specific evidence" of each element of each cause of action pled—even non-defamation claims.

(ii) Automatically stays discovery—usually the most expensive stage of a case.

(iii) Requires the court to hold a hearing on the defendant's motion to dismiss within 60 days—light-speed by juridical standards.

(iv) Requires the court to rule on the defendant's motion to dismiss within 30 days of the hearing—curing the common scourge of a court's passively denying relief by simply never making a ruling.

(v) Mandates not only an award of the defendant's attorney's fees but also *sanctions* "sufficient to deter the filing of similar actions."

(vi) Flings the doors of the appellate courthouse wide open if the trial court fails to rule and allows a rare "interlocutory" appeal—which is also given precedence over *all other appeals*.

(vii) Requires courts to "liberally construe" the TCPA to "fully effectuate" its purpose and intent.

In one of this firm's cases presently on appeal, we are asking for $1 million in sanctions for our client—a higher amount than any court has awarded to date, but one we believe justified under the unique facts of that case. Perhaps more importantly, briefing in that case was completed only in early October, the case was orally argued on October 21, 2014, and the case is now ripe for a decision in the court of appeals.

If you get SLAPP-ed in Texas, look down. Thanks to the TCPA, you are already wearing the ruby slippers that have the power to whisk you away from the land of witches, judges, and legal bills more quickly than you may think. Like Dorothy, you just didn't know it.

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