

# Risky business: Net postings, SLAPP suits

The evolution of the Internet over the past few years has given ordinary individuals access to a steady stream of information, as well as the ability to interact with others. By now, we are all aware that the Net is used for many purposes, including improper and illegal activity. Whether it's an e-mail inbox flooded with spam or a virus that deletes files, few have been spared the frustration of dealing with improper conduct on the Net.

## Scope

The free-flowing exchange of information has been a concern for companies that have been targets of unfavorable discussions on the Net. Many portals and Web sites allow users to discuss publicly traded companies on their message boards. Users generally register with the site and create a user name that allows them to post and discuss information anonymously. The discussions range from thoughtful analyses to down-right derogatory statements about companies products, services or management. Some companies have reacted by filing defamation suits to prevent such content from reaching others on the Net. But this approach can be dangerous.

The law surrounding Internet privacy and use is in its infancy, although recently there has been considerable litigation with respect to Internet postings. A company wishing to sue a person for posting defamatory content has a practical problem: The identity of the person it wants to sue is unknown. Generally, Internet portals won't divulge information without a subpoena or a court order.

So the company must file a lawsuit against "John Doe," along with a motion seeking expedited discovery and a subpoena. The portal will usually notify the user of the pending lawsuit and subpoena and advise him of his right to contest it. If the user fails to challenge the subpoena, the portal is obligated to disclose the person's identity.

## Free-speech concerns

In California, a company that pursues such an action can expect a defense based on California's Strategic Litigation Against Public Participation (SLAPP) statute. The statute permits a defendant to file a motion to dismiss the suit upon meeting a two-prong test: 1) The alleged bad conduct arose from his or her exercise of free speech regarding a public issue; and 2) The plaintiff can't show that they'll likely prevail in the suit. If a user files a motion and prevails, the action would be dismissed and the defendant would be entitled to recover attorneys' fees and costs from the company.

No state or federal appellate court has decided how the SLAPP statute applies to Internet postings. Recently, a California district court held that postings about public companies are "public issues" falling within the anti-SLAPP provisions. Therefore, the user likely would prevail under the first prong of the statute. To avoid dismissal, the company would have to show that it likely would prevail in the lawsuit. Generally, to prevail on a defamation claim, one must establish that the offender published false statements — presented as fact, not mere opinion — about the plaintiff, which caused damages.

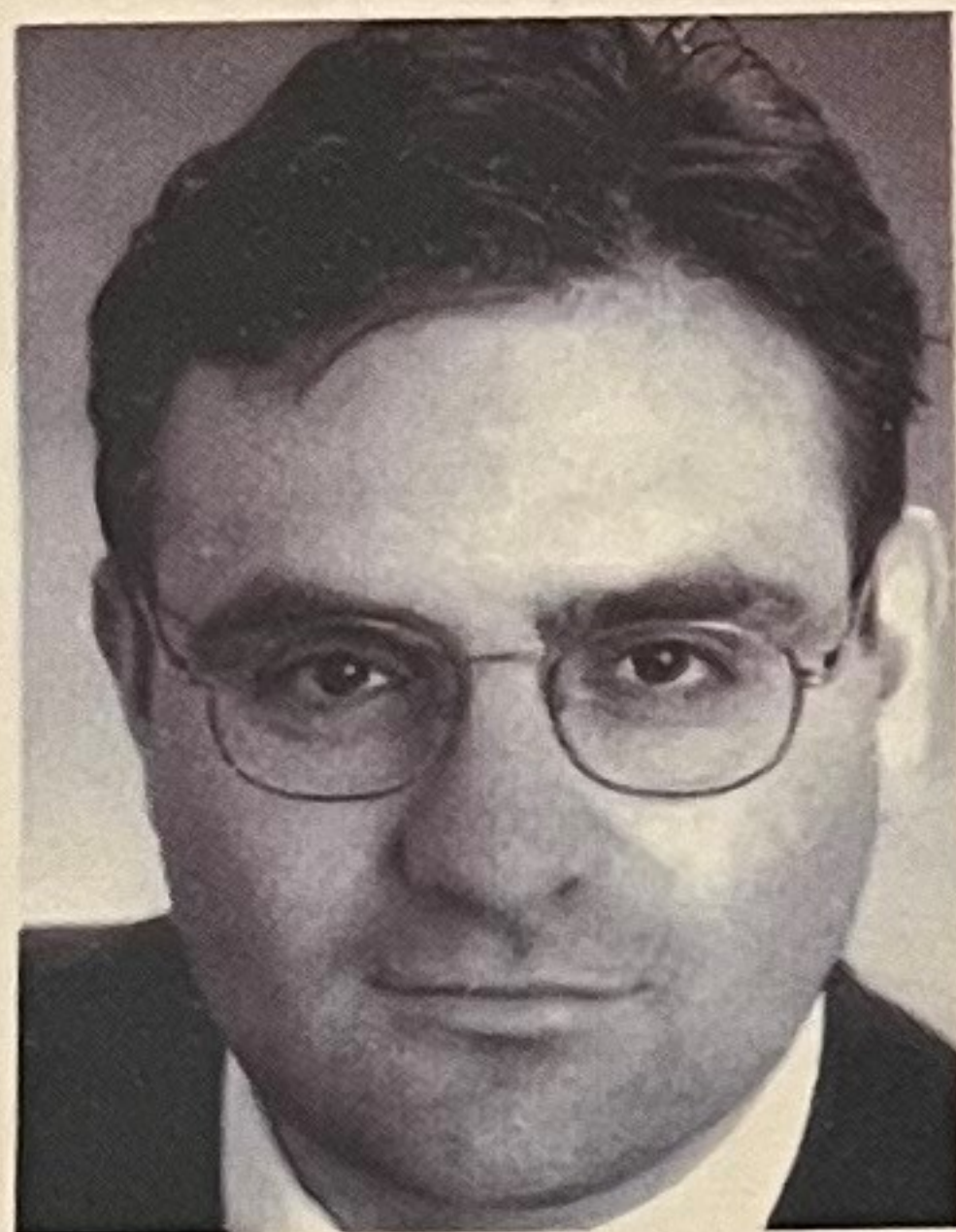
In principle, inability to show damages alone can cause a plaintiff to lose. For example, a company would likely lose a SLAPP motion if it claimed its stock price fell because of a single false and malicious post by a disgruntled shareholder.

## No discovery/alternatives

A company considering filing suit against a cybersmear artist shouldn't expect to have the luxury of time to discover the poster's identity and assess the damage. Several First Amendment advocacy organizations undertake cases for defendants. If they conclude a SLAPP defense has probable merit, they appear early and often succeed in staying the Internet portal's subpoena for identity information.

The psychological incentive to sue Internet posters can be strong. But because a plaintiff can end up paying both its own and the defendants' attorney's fees, it involves a serious risk-benefit analysis.

Instead of filing suit, a company should consider following the procedures set by the portals for posting on their message boards. If a company notices improper content, it can usually send a letter to the portal requesting that it delete the posts. In many instances, this option may solve the company's problem in a cost-efficient manner and with the least amount of exposure to potential liability.



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