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Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem

Sean P. Trende

The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs.

~ Justice Hugo Black

See even if I lose the cases. [sic] I'm still going to win because I'm [going to force them] to spend at least $50,000.00 each in legal fees. Either way. [sic] I win.

~ Anthony DiMeo

The story of the Internet is one of decentralization and democratization. The internet was born as a centralized, government-sponsored experiment. Over time, the governmental model gave way to domination by large commercial entities, as companies such as America Online, Inc., and CompuServe, Inc., created and hosted forums for people to gather online. Small-scale operations existed, but they were generally reserved for persons with technical backgrounds, who had the time and resources to acquire the knowledge needed to speak the language of the internet: Hyper-Text Markup Language ("HTML").

While these companies remain major forces in the development of the internet today, the advent of free, easy-to-use software that enables self-publication on the internet and of fast broadband connections that do not require even the click of a mouse to connect to the internet has reduced the influence of the middlemen, leaving many webusers with nothing but a broadband connection.

1. Associate, Hunton & Williams, LLP. J.D., Duke University School of Law, 2001; B.A., Yale University, 1995. The views expressed in this article are my own, and are not intended to in any way represent the views of my law firm. I would like to thank Sarah Cottrill for encouraging me to write this article, and the staff of the Duquesne Law Review for editing it. Thanks are not enough for the gratitude I owe my wife, for all her love and support.


3. E-mail from Anthony DiMeo to "Scott" (July 10, 2006) (on file with author).
and Internet Explorer. This increased freedom has also resulted in the rise of a new type of entity on the internet. Weblogs, or "blogs" are typically run by small, unincorporated individuals, sometimes as a mere pastime. Collectively, these blogs are known as the "blogosphere," and much as a collection of water molecules can become a tsunami of unimaginable power, so too can the collective power of the blogosphere wield tremendous significance. Individual writers without large corporate backing have signed book deals and made the New York Times Best-Seller list, largely based on the readership "built from scratch" through their online writings. Their power extends to politics as well - blogs can reasonably claim to have brought down a Senate Majority Leader, ended the career of a network news anchor, and defeated a sitting Senator and recent vice-presidential candidate in a primary campaign. 

Like all emerging media, the blogosphere has had growing pains, but bloggers have met many of these problems head-on. For example, they have testified before Congress to ensure that they would not be brought within the scope of federal campaign finance laws. Bloggers are, as of this writing, engaged in a battle over "net neutrality," proposed legislation that would apply common carrier rules to internet service providers ("ISPs") and force them to manage all internet traffic equally, and bar ISPs from de-

4. See, e.g., Warren St. John, Dude, Here's My Book, N.Y. TIMES, April 16, 2006, at 9-1 (describing new genre inspired by internet writers such as Tucker Max and George Ouzounian (aka "Maddox").


prioritizing certain non-commercial sites. But while the blogosphere has been busy combating attempts by Congress and ISPs to regulate or potentially stifle their speech, they have largely ignored the renewed threat defamation law poses to their small-scale operations. In the long run, bloggers may find that clever attorneys ultimately pose a greater threat to internet freedom than does Congress. Making ambitious use of defamation law principles intended to protect those with the inability to fight back and of provisions in the Telecommunications Act intended to protect abused women, recent cases such as *DiMeo v. Max* illustrate the challenges that modern defamation law poses to the emerging blogosphere. *DiMeo v. Max* is a case where the rare "smoking gun" exists: e-mails from the plaintiff to third parties indicating that the plaintiff is well aware of the strategic advantage he holds from the mere threat of running up the defendant’s court costs. Such smoking guns are rare, however, and while the number of such suits is thus difficult to trace, the potential destructive toll is easy to see.

While this threat has existed from the beginning of cyberspace—the internet was still very much in its infancy when the first law review article appeared with "defamation" and "internet" in the title—and while Congress made efforts to mitigate this threat in the days when the internet was dominated by major organizations—little has been done to protect a small-scale blogger who faces the high costs of litigation, even if the published content is true or if the comments were made by others on the blogger’s blog or message board.

Because of the importance of the blogosphere as an emerging medium, this Article suggests that Congress should adopt a federal statute to protect speakers from such "Strategic Lawsuits Against Public Participation” (SLAPPs). Such anti-SLAPP laws could serve as a powerful deterrent against groundless suits. In support of this thesis, the Article begins by exploring the growth of the internet and its recent transformation into a medium domi-

11. See infra notes 189-90 and accompanying text.
nated by individuals. Part II analyzes the current legal framework, including a brief overview of defamation law, and contains an analysis of previous legal attempts to fit the internet into various defamation frameworks. Part III analyzes two cases as a template for understanding the unique problems that the "new" internet faces, while Part IV explores potential solutions to the problem, and concludes that federal anti-SLAPP litigation would be a strong step toward the protection of First Amendment freedoms on the internet.

I. THE GROWTH OF THE "NEW" INTERNET AS A DECENTRALIZED COLLECTION OF SMALL PROPRIETORSHIPS

A. The Old Internet

Ten years ago, Judge Stewart Dalzell referred to the internet as "the most participatory marketplace of mass speech that . . . the world . . . has yet seen." Since that statement, however, the internet has exploded to a degree of importance that was practically unimaginable in 1996. Today, this "international network of interconnected computers" hosts what amounts to a "never-ending world-wide conversation," whereby billions of people and their points of view are quite literally a mouse-click away. Yet it was not that long ago that all computers were simply "dummy terminals" -- that is, computers that were unable to contact and exchange data directly with other computers. A brief history of the growth of the old, centralized internet follows.

1. The Early Years

The internet was born in 1965, when researchers used an ordinary telephone line to connect two computers -- one in Massachusetts and one in California -- and allowed them to "speak" to one another. With that discovery began the trek toward the modern internet. With funding from the Department of Defense a some-
what larger network known as ARPANET\(^\text{17}\) was constructed in the 1960s and 70s.\(^\text{18}\) Following this achievement, different governmental entities began to set up their own internal networks.\(^\text{19}\) As this networking of computers spread, so to did the technologies that enabled the networking. In 1972, electronic mail, or “e-mail” was developed. The advent of “TCP/IP” technology followed, which allowed users on any network to communicate with users on a different network.\(^\text{20}\) The development of TCP/IP was a major milestone, giving birth to the “network of networks” that characterizes the modern internet.\(^\text{21}\)

It was not until 1984, however, that the number of internet hosts grew to over one thousand.\(^\text{22}\) The pace of the development of the internet picked up briskly from that point, as technology improved, and the National Science Foundation embarked upon an intense effort to improve the internet’s use. By 1992, there were over one million servers in use, a thousand-fold increase over the span of eight years.\(^\text{23}\) Use was spreading outside the government as well. CompuServe, founded in 1969 as an in-house networking company for Golden United Life Insurance Company, became a major provider of home online services in the 1980s.\(^\text{24}\) Other companies such as America OnLine followed suit, beginning as small Bulletin Board Services (“BBS”) and growing rapidly.\(^\text{25}\)

2. Early Formats

The early formats operated by internet users must be explained to understand early internet defamation litigation. For example, many internet providers offered (and still offer, in much more advanced forms)\(^\text{26}\) “chat rooms,” one of the oldest forms of internet


\(^{18}\) Leiner, supra note 16.

\(^{19}\) Id.


\(^{21}\) Leiner, supra note 16.

\(^{22}\) Weinberg, supra note 16, at 193 n.27.

\(^{23}\) Id.


\(^{26}\) In many ways, the popular “Instant Messenger” software, or “IM,” is nothing more than an advanced, fast, highly flexible chat room.
A chat room is a place where people have "real-time, synchronous conversations . . . by typing messages into their computers." These messages, in turn, are posted in a particular area, or "room," where various users in the rooms may read them. Some rooms are available to all, while some rooms are available only to a discrete number or subsection of individuals.

Another type of early "e-forum" was a "bulletin board" or "message board." Message board participants begin with a comment, to which other participants or "users" respond. These responses form a "thread," which — unlike a chat room — becomes a permanent part of the internet. While many chat rooms are "unmoderated," meaning no one follows or edits the content, most message boards have a hierarchy of administrators, super moderators, and moderators, all charged with different levels of responsibility for maintaining the quality and consistency of the online discussion by deleting posts and threads that are inconsistent with the board's overall mission. Persons posting in both chat rooms and message boards often post under pseudonyms, thereby concealing their true identity. Message board users also can upload pictures, or avatars, that will accompany every post, giving them something of an "e-identity."

A unifying theme of these different media was that they generally required a large corporate entity in order to participate, or a high degree of technical proficiency to create. "Dial-up" services such as AOL and CompuServe usually hosted the web service, and controlled the format in which people participated, almost always for a hefty fee. This was about to change, however, with the advent of the World Wide Web.

B. Growth of the "New" Internet: The Blogosphere

Today, the amount of information stored online is staggering, as over a billion pages of information now are available to users online. Modern computers are connected to each other through thousands of networks of satellite signals, phone lines, fiber optic lines, or cable TV lines. It is now estimated that the internet

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29. Jennifer O'Brien, note, Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases, 70 FORDHAM L. REV. 2745, 2748 n.17 (2002).
claims over one billion users worldwide — nearly one of every six persons on the planet.  

Three-hundred and thirty million of those users are located in North America. The growth in third world countries is especially astounding, with Africa and the Middle East experiencing over 400% growth in usage since 2000. Part of the reason for this explosive growth has been an expansion in the availability of user-friendly technology that replaced the fairly "clunky" BBS and chat room technology that dominated the 1980s.

1. Early Development of the World Wide Web

The deployment of the briefly-successful "gopher" protocol, whereby a user could easily retrieve information from other computers, presaged the advent of the "World Wide Web." The World Wide Web is a free service deployed by CERN, which makes it possible for persons to easily link to other computers. Technology for this World Wide Web improved quickly. The first web browser for use in Microsoft Windows — NCSA Mosaic — became available in March of 1993, while a browser that enabled the use of graphics as part of a webpage became available in January of 1994. Netscape — the first browser to use the tables that are now the backbone of any webpage — came online in March of 1995. A few months later, Microsoft released its now-famous Internet Explorer, ensuring that every person who bought a computer running on a Windows platform could get World Wide Web access.

At the same time, technology was becoming more user-friendly, and control of content was moving away from companies and toward the individual. Prodigy Communications Corporation was an early ISP, which in addition to hosting the traditional bulletin boards and chat rooms, provided access to the World Wide Web and allowed hosting of individual member web pages. While the

31. Id.
ability to create a webpage through HTML programming was a somewhat rare talent, a major step had been taken toward the democratization of cyberspace that took place in the 2000s.

2. Enter the Blogs

The final steps toward the decentralization of cyberspace occurred as the dynamic blog began to influence — and to a certain extent replace — static webpages. While the traditional website can only be altered through a complicated series of code changes, a blog is an interactive online journal, whereby a poster can quickly post his or her thoughts online through easy blogging software. The concept existed in various forms for quite some time, but was not officially given the name “weblog” until 1997, when web publisher Jorn Barger coined the term. The term was subsequently shortened to “blog,” and used both to connote the website itself, as well as the act of writing the blog. In 1999, the software Open Diary allowed users to permit comments by other users on their site, turning one-sided, top-down commentary into the conversation that has come to characterize the internet today.

Other sites, such as LiveJournal and the wildly popular “Blogger” software soon followed. These sites allow a user to choose from a variety of blog templates, and set up their own free blog in about ten minutes without any technical expertise or understanding of programming languages. A user then simply types his thoughts in a dialogue box, gives the “post” a title, presses a button, and waits a few short seconds while the blog entry is auto-

36. Software such as Adobe GoLive makes programming easier.
37. In a very abstract sense, there is really nothing new about the idea of the blogosphere. As one commenter has noted, HAM radio operators and various newswires such a Reuters and AOL have had online conversations for decades. Wikipedia – the Free Encyclopedia, http://en.wikipedia.org/wiki/Blog#History. Indeed, even the old USENET and BBS functions of the internet mimicked modern blogs somewhat. Wikipedia – the Free Encyclopedia, Blog, http://en.wikipedia.org/wiki/Blog#History (last visited July 6, 2006). What makes the blogosphere so unique, though, is the ease with which one can make one’s voice heard. With the advent of the blogosphere, every person really does have their own printing press.
38. Id.
39. Id.
40. Id.
43. Indeed, some of the most successful blogs on the internet still maintain their “blogspot” prefix. See, e.g., http://atrios.blogspot.com/ (last visited July 9, 2006); iraqthemodel.blogspot.com (last visited July 9, 2006).
matically placed on the internet by the blogging software.\textsuperscript{44} Today, blogs cover a stunning array of topics, from politics\textsuperscript{45} to sports\textsuperscript{46} to parenting.\textsuperscript{47}

Blogging software thus took the highly specialized field of website design and made it available to the masses. In a few short years, we have gone from the conversation of the internet being dominated by message boards supported by large companies such as AOL/Time Warner or Yahoo!, to an era where some of the biggest sites are run by sole proprietors. Thus, the blogger in many ways epitomizes the “lonely pamphleteer” about which the Supreme Court so eloquently spoke in \textit{Branzburg v. Hayes}.\textsuperscript{48}

For example, one of the most successful blogs on the internet is Daily Kos, the brainchild of Markos Moulitsas Zuniga.\textsuperscript{49} Kos began as a poster on political consultant Jerome Armstrong’s site MyDD. As the result of his success as a poster there, Kos began his own site, initially called fishyshark.com, before moving to his current platform, “DailyKos.com.” What began as a pastime that rarely received comments\textsuperscript{50} has morphed into one of the most heavily trafficked sites on the internet.\textsuperscript{51} Daily Kos now receives 415,000 unique visits a day, and nearly twenty million visits per month.\textsuperscript{52} By way of contrast, in 1997, Matt Drudge’s “Drudge Report” was considered to be among the “elite” websites when his webpage brought in seventeen thousand visits per day.\textsuperscript{53}

\textsuperscript{44} Almost all blogs provide a “comment” field whereby a user can click and post his own thoughts. Most blogs require some sort of registration, whereby a person inputs an e-mail address, a name, and their own website, if appropriate. It is difficult—if not impossible—to verify that the name is correct, or that the name listed on the e-mail address is a real name. Thus, posters on blogs, like their counterparts on message boards, maintain a high degree of anonymity if they wish.


\textsuperscript{47} See, e.g., Dooce, http://www.dooce.com/ (last visited July 8, 2006).


\textsuperscript{52} SiteMeter, Counter and Statistics Tracker, http://www.sitemeter.com/?a=stats&s=sm8dailykos&r=25 (last visited July 9, 2006).

\textsuperscript{53} Michael Hadley, \textit{The Gertz Doctrine and Internet Defamation}, 84 VA. L. REV. 477, 494 (1998) (“Only a small percentage of Web sites receive that kind of attention, and very few of them are operated by a single person.”).
Kos brings in guest commenters to help run his front page, the site is still run, owned, and operated by one man.

Daily Kos typically receives over two hundred comments in response to a single post. Given multiple postings and "diaries," the site receives approximately twelve thousand comments per day. Obviously, managing and editing such content is nearly impossible. Blogging platforms such as "Scoop" expand the comment concept, and turn an individually-owned blog into the equivalent of the corporate-owned BBS of the 1980s. With Scoop, anyone can create a "diary" on a Scoop-supported blog, allowing a user to keep her own "mini-blog" within the larger weblog.

This "freeware" has resulted in a sharp increase in the numbers of both blog publishers and readers. A January 2005 poll for the Pew Internet and American Life Project revealed that over eight million people claimed to have created a blog or web-based diary, while over thirty-two million people claimed to be blog readers.

Numerous commenters have noted that the ease of use and relative availability of the blogosphere make blogs the "great democratizers" of speech. As one analyst put it (in the context of blogging for law firms), "much like the Web, blogs are a very democratic form of communication. With a very small investment and some help from a web designer, there is virtually no difference between a solo practitioner in outer Mongolia and an Am Law 100 firm."

56. In Scoop’s own words, Scoop is a "collaborative media application." It falls somewhere between a content management system, a web bulletin board system, and a weblog. Scoop is designed to enable your website to become a community. It empowers your visitors to be the producers of the site, contributing news and discussion, and making sure that the signal remains high. Scoop, http://scoop.kuro5hin.org/ (last visited July 4, 2006).
57. Scoop-style blogs are especially popular within the liberal blogosphere, where high-traffic blogs such as MyDD, TPMCafe, and Daily Kos all allow registered readers to author diaries, which are then published on the front page. See MyDD, http://www.mydd.com/; TPMCafe, http://www.tpmcafe.com/blog; Daily Kos, http://www.dailykos.com/.
Unfortunately, the growth of the blogosphere has not been without problems. Comment fields on many blogs are often virtual warzones. Posters rarely have in-person interaction with other posters, and hence become detached from their sense of personhood. This in turn leads to endless “flame wars” on many blogs. The blogosphere has seen the rise of a variety of characters, such as “trolling,” a “purely mischief-making activity” whereby the troll “initiates an antagonistic environment.”61 Other types of posters include characters such as “Mobys:” persons who go onto websites, pose as someone with political views similar to those on the website, and direct them to arguments that disfavor the political view espoused by the site.62

With a large number of comments, and a large number of persons making those comments dedicated to mischief-making through a variety of techniques, it is difficult for a website operator to root out all possible instances of nasty speech on a given website. One can imagine that a website such as Daily Kos would have to hire hundreds of people to patrol the comments in search of potentially false postings. Given common law defamation law, this posed a real threat to the growing Internet community. Had Congress not acted, comment-enabled blogs could well be impossible.

II. THE CURRENT LEGAL FRAMEWORK

A rise to prominence always invites controversy, and the rise of the blogosphere is no exception. This section briefly explores the history of defamation law. It then embarks upon a more thorough explication of courts’ attempts to fit the emerging internet into the old defamation rubric. It then examines Congress’s attempt to “fix” the courts’ rulings, and subsequent case law.

62. The term seems to have grown out of musician Moby’s urging of persons to attack George W. Bush through right-wing websites. Moby suggested:
For example, you can go on all the pro-life chat rooms and say you’re an outraged right-wing voter and that you know that George Bush drove an ex-girlfriend to an abortion clinic and paid for her to get an abortion. Then you go to an anti-immigration website chat room and ask, “What’s all this about George Bush proposing amnesty for illegal aliens?”
A. The Basics of Defamation Law

Defamation is an ancient tort, designed to protect a person from false statements that are harmful to that person's reputation. The basic law of defamation can be summed up in a single sentence: "Defamation is committed when a false and defamatory statement concerning another has been published to a third party, absent privilege, and that statement causes damage or is so egregious that damages are presumed." A communication is defamatory when "it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

From those basic rules, courts have carved an intricate lattice of exceptions, definitions, and privileges. For example, the common law took the view that libel occurred each time a defamatory statement was published, thus it treated one who repeated or otherwise republished a libelous statement as if he or she had actually published it. Distributors such as bookstores and libraries, however, were found liable for republication of libel only if they knew or had reason to know of the defamatory content. Thus,

64. Conway-Jones, supra note 27, at 65.
65. See RESTATEMENT (SECOND) TORTS § 559.
66. Many of these exceptions are extremely important but are also irrelevant for the purposes of this article, so it is sufficient to note in passing that plaintiffs face a higher burden of proof if they are a "public figure" or "limited purpose public figure." A trio of Supreme Court opinions lays out the basic framework. An elected official or public person speaking on a matter of public concern must prove actual malice on the part of a defamatory speaker by clear and convincing evidence. The standard of proof for a private plaintiff speaking on a matter of public concern is lower, and the standard for private plaintiffs speaking on purely private matters is set by state law, but cannot be strict liability. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974); Time, Inc. v. Hill, 385 U.S. 375 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Also, a defamatory statement may not be an expression of mere opinion, but rather must be factual in nature, or a statement of opinion that gives rise to a factual inference. Milkovich v. Lorain Journal Co., 497 U.S. 1, 18-19 (1990). Thus, satire, parody, hyperbole, and invective are non-defamatory in nature. Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988); Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 264-65 (1974); Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 6 (1970).
67. See RESTATEMENT (SECOND) TORTS § 578. See also, e.g., Cianci v. New Times Pub. Co., 639 F.2d 54, 61 (2d Cir. 1980). This was true even if the republisher names or explicitly cites to the original publisher. RESTATEMENT (SECOND) TORTS § 578 cmt. b.
while a newspaper might have been found liable for defamation at common law for unknowingly republishing an untrue story, the newsstand that carried it would not be so liable, unless it knew or had reason to know that the newspaper story contained untruths. The common law extended these rules to emerging media such as television and radio, and treated a libel broadcast by those media as if it had been published by an original publisher.69

B. The Complications of Defamation Law and the Internet

To early legal analysts it seemed a given that the Internet would be treated no differently under the law of defamation than any other print medium. The introduction to a 1996 article opined: “Much of this activity [analyzing cyber-defamation] is somewhat misleading. . . . Currently there are two reported decisions that are the primary focus of the ‘cyberlibel’ debate. They rely not on arcane computer issues, but on familiar common law principles.”70 This paralleled the initial attempts of courts to deal with the advent of television and radio: Notwithstanding the attempts of Georgia to create a tort of “defamacast,”71 most courts easily placed these new media into traditional categories. This section begins with an explication of the two seminal cases of internet defamation, and the Act that effectively mooted them both. It then examines how courts have reacted to this congressional enactment by essentially creating a federal “defamanet” standard, and how that reaction has served early ISPs and large-scale operations well.

1. Pre-CDA Caselaw

Prior to 1996, it was becoming increasingly obvious that online sources would be treated as publishers for purposes of defamation law.72 A pair of decisions from New York are considered the semi-

69. RESTATEMENT (SECOND) TORTS § 581(1).
72. Probably the earliest case involving an untruth in cyberspace is Daniel v. Dow Jones, Inc., 520 N.Y.S.2d 334 (N.Y. City Civ. Ct. 1987). Although not technically a defamation case, it is notable for its analogy of online services to newspapers. See id. at 337-38 (“There is no functional difference between defendant’s service and the distribution of a moderate circulation newspaper or subscription newsletter. The instantaneous, interactive,
nal developments in the early law of cyber-defamation. The first
decision is *Cubby Inc. v. CompuServe, Inc.* as discussed above, CompuServe was an early internet bulletin board that served as
"an on-line general information service or 'electronic library' that
subscribers may access from a personal computer or terminal." At that time, CompuServe users paid a fee to access this library,
which contained thousands of sources, as well as 150 special inter-
test forums and bulletin boards.

One of these forums was the Journalism Forum. This forum
was managed by an outside company, Cameron Communications,
Inc., which "manage[d], review[ed], create[d], delete[d], edit[ed],
and otherwise control[led] the contents in the Journalism Fo-
rum." Ominously, the Journalism Forum contained a publication
entitled "Rumorville USA," which in turn was published on
CompuServe's server by an outside entity, Don Fitzpatrick Associ-
ates of San Francisco ("DFA").

Plaintiffs Cubby, Inc. ("Cubby") and Robert Blanchard
("Blanchard") developed a service called "Skuttlebut," a database
that was intended to compete with Rumorsville. Apparently
fearing this new competition, Rumorsville published statements
alleging that Skuttlebut was a "new start up scam" that had
gained access to information from Rumorsville "through some
back door." Incensed, Plaintiffs sued for libel, business dispar-
agement, and unfair competition. CompuServe conceded that the
statements were defamatory, but argued that it was merely a dis-
tributor of the information, and therefore was not liable under
traditional defamation law principles.

The *Cubby* Court found for CompuServe. It found that Compu-
Serve products were more akin to libraries than to a printing
press, and that "CompuServe's CIS product is in essence an elec-
tronic, for-profit library that carries a vast number of publications

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74. *See supra* note 24 and accompanying text.
75. *Cubby*, 776 F. Supp. at 137.
76. *Id*.
77. *Id*.
78. *Id* (internal quotations omitted).
79. *Id*.
81. *Id*.
82. *Id*.
83. *Id*.
and collects usage and membership fees from its subscribers in return for access to the publications.\textsuperscript{84} The court, however, did not set out a broad rule of distributor-style immunity for web-based applications; rather it emphasized CompuServe's lack of editorial control\textsuperscript{85} and explained that a rule that required a "national distributor of publications" to "monitor each issue of every periodical it distributes" would be "an impermissible burden on the First Amendment."\textsuperscript{86} The Cubby court also noted that "CompuServe and companies like it are at the forefront of the information industry revolution" and that "[t]echnology is rapidly transforming the information industry."\textsuperscript{87} These words indicate that the Cubby court sensed that it had not issued the last word on the issue and was aware that a future decision would likely limit, expand, or otherwise alter the holding in Cubby.

That decision came four years later in Stratton Oakmont Inc. v. Prodigy Services Co.\textsuperscript{88} Perhaps the most interesting thing about Stratton Oakmont is that the court seemed to have little sense that it was about to change the course of legal history – indeed the Stratton Oakmont decision was unpublished. In that case, a securities firm sued Prodigy for allegedly defamatory statements made by a poster on a Prodigy message board.\textsuperscript{89} Postings claimed that

(a) STRATTON OAKMONT, INC. ("STRATTON"), a securities investment banking firm, and DANIEL PORUSH, STRATTON's president, committed criminal and fraudulent acts in connection with the initial public offering of stock of Solomon-Page Ltd.;

(b) the Solomon-Page offering was a "major criminal fraud" and "100% criminal fraud;"

(c) PORUSH was "soon to be proven criminal" and

\textsuperscript{84} Id. at 140.
\textsuperscript{85} "While CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents. This is especially so when CompuServe carries the publication as part of a forum that is managed by a company unrelated to CompuServe." Cubby, 776 F. Supp. at 140.
\textsuperscript{86} Id. (quoting Lerman v. Flynt Distributing Co., 745 F.2d 123, 139 (2d Cir. 1984)).
\textsuperscript{87} Cubby, 776 F. Supp. at 140.
\textsuperscript{89} Stratton Oakmont, 1995 WL 323710, at *2.
(d) STRATTON was a "cult of brokers who either lie for a living or get fired."90

Stratton Oakmont was not amused by these statements, and sued Prodigy for one hundred million dollars in compensatory damages and one hundred million dollars in punitive damages.91

Stratton Oakmont's theory was that Prodigy was liable as a publisher rather than as a mere distributor because, unlike CompuServe, Prodigy edited the content of the posts to protect consumers from sexual or otherwise offensive postings. The Stratton Oakmont court soundly rejected Prodigy's arguments that it should not be punished for editing the content of its message boards:

That such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made, does not minimize or eviscerate the simple fact that Prodigy has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards.92

Thus, the Stratton Oakmont court found that in Prodigy's case, the act of attempting to control the content of its publication: "PRODIGY's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice."93

2. The Communications Decency Act of 1996

The potentially devastating effects of this decision for the internet – which was just then being thrust into the public eye – were immediately apparent. Under Stratton Oakmont and Cubby, a message board operator had two choices: either abstain from editing content and become a passive conduit for information, or attempt to edit content to an almost impossible extent.

This presented something of a perverse incentive. An operator that made no attempt to identify and root out crass, obscene, or even defamatory content, or engage in "undue self-censorship to

90. Id. at *1.
93. Id. at *5.
avoid the negative consequences of speaking was excused from liability, while an operator who attempted to root out such speech could be punished for unsuccessful efforts. The chilling effect this could have on speech was profound. As the Fourth Circuit would later explain,

Interactive computer services have millions of users. . . . The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of [its] millions of postings for possible problems. Faced with potential liability for each [republished] message, interactive computer service providers might choose to severely restrict the number and type of messages posted.95

In a propitious coincidence, Congress was considering a massive overhaul of telecommunications law at the time that the *Stratton Oakmont* decision came out. Arguably the most important Act of the 104th Congress, the law represented a massive deregulation of the telecommunications industry. Tucked away in Title V, however, were a few provisions related to the internet, called the Communications Decency Act.96 While this portion of the Act was largely – and most famously – an attempt to stop the spread of pornography online, Title V also contained a few sections intended to remove publisher liability as a theory for proceeding against internet publishers. In the wake of the *Stratton Oakmont* decision, ISPs labored heavily to ensure that the CDA provisions were included in the final version of the Act.

The explicit goal of the CDA was to overrule *Stratton Oakmont* and make it possible for ISPs to edit their content without taking on publisher liability.97 The debates surrounding that Act empha-

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96. Pub. L. No. 104-104 (known as the Communications Decency Act, or “CDA”).
sized the extraordinary pressures placed upon ISPs. One Congressman explained:

There is no way [these] entities . . . can take the responsibility to edit out information that is going to be coming in to them from all manner of sources . . . . [This] is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong.  

In final form, the CDA contained a number of specific findings, which made it the official policy of the United States to encourage the growth of the World Wide Web and to ensure that ISPs could edit obscene or offensive materials without incurring greater liability. For example, the CDA found that the internet was “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues of intellectual activity.” It further explained that it was “the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”

To achieve these ends, and to address the holding in Stratton Oakmont, the Act bluntly declares that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” This sentence effectively “overrides the traditional treatment of publishers, distributors, and speakers under statutory and common law,” uprooting years of state common law and ensuring that providers of interactive computer services—basically, ISPs—could not be found liable for defamatory content. On its face, a fair reading of the act might suggest that the CDA retained distributor liability for ISPs. The cases that followed, however, interpreted the law in a much broader manner.

100. Id. § 230(b)(2).
101. Id. § 230(c)(1).
102. Batzel v. Smith, 333 F.3d 1018, 1026 (9th Cir. 2003).
103. The Act defines a provider of interactive computer service as “[a]ny person or entity that is responsive, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(d)(2).
3. *Post-CDA Caselaw*


In April of 1995, shortly after the bombing of the Alfred P. Murrah federal building in Oklahoma City, a poster on a popular AOL message board began advertising "Naughty Oklahoma T-Shirts." These ads described t-shirts that included "offensive and tasteless slogans" related to the Oklahoma City bombing, and an instruction to call "Ken" at a certain phone number. The advertisement instructed people to "call back if busy" due to the high demand for the t-shirts. The phone number connected to the house of Kenneth Zeran, who, according to the pleadings, did not sell the offensive t-shirts. Despite attempts by AOL to remove the messages, news spread quickly. A DJ at KRXO in Oklahoma City caught word of the posting, and urged listeners to call the number and express their displeasure. Unsurprisingly, Zeran was inundated with phone calls and death threats - after ten days of such postings, Zeran was receiving threatening phone calls every two minutes. Even after an Oklahoma newspaper reported that the shirts were a hoax and KRXO issued an on-air apology, Zeran received up to fifteen calls a day in response to the post.

Zeran sued American Online for defamation in the Western District of Oklahoma; the case was transferred to the Eastern District of Virginia, where AOL is headquartered. The district court dismissed Zeran's claims. On appeal, the Fourth Circuit affirmed. The Fourth Circuit's holding was of surprising breadth to many. Zeran argued that the CDA eliminated only publisher liability and retained distributor liability for ISPs. Such a holding would have maintained AOL's liability in the event that Zeran could prove that AOL knew or had reason to know of the defamatory nature of the posting. The *Zeran* court disagreed, emphasizing that "pub-
lication” was an essential element of the tort of defamation regardless of whether the defendant happened to be a bookstore or an author.\textsuperscript{112} In this sense, the Fourth Circuit explained, the distributor/publisher dichotomy in the context of the CDA only exists within the larger category of “publisher.” The Fourth Circuit therefore held that “Stratton and Cubby do not . . . suggest that distributors are not also a type of publisher for purposes of defamation law.”\textsuperscript{113}

The Fourth Circuit also held that notice of the defamatory content of a post does not transform an ISP from a publisher to a distributor. Rather, the court explained that such a rule would thwart the purposes of the CDA.\textsuperscript{114} The Zeran court went so far as to suggest that a contrary interpretation could raise serious First Amendment concerns:

If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information’s defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context. Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not. Thus, like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech.\textsuperscript{115}

The court also noted that imposing notice-based liability upon ISPs would give “a no-cost means to create the basis for future lawsuits” to third parties. Because of the havoc a group of eager

\textsuperscript{112} Zeran, 129 F.3d at 332.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
third persons could cause by simply claiming that posted information was defamatory, the Court concluded that "[b]ecause the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230’s statutory purposes, we will not assume that Congress intended to leave liability upon notice intact."\(^{116}\)

\[b. \] **Blumenthal v. Drudge\(^{117}\)**

The *Zeran* decision has engendered a number of similar cases that expanded upon its broad scope. In 1995, Matt Drudge began publishing a website entitled “The Drudge Report.”\(^{118}\) The Drudge Report began as essentially an internet gossip column that contained links to various online publications and news stories. It also published a newsletter that quickly spread in prominence – in 1995 it had one thousand subscribers, but by 1997 it had grown to 85,000 subscribers.\(^{119}\) The Drudge Report was published by “Wired” Magazine and displayed on the internet by “HotWired,” one of the early online journals.\(^{120}\) In 1997, the Drudge Report moved to AOL.\(^{121}\)

On August 10, 1997, the Drudge Report published a story alleging that incoming Assistant to the President Sid Blumenthal had a history of domestic violence.\(^{122}\) The next day, Blumenthal’s counsel directed a letter to Drudge, demanding a retraction. Drudge complied.\(^{123}\) Drudge also sent an e-mail retracting the story, and publicly apologized to the Blumenthals.\(^{124}\) The Blumenthals nonetheless pursued litigation in the United States District Court for the District of Columbia, suing both Drudge and AOL.

The Blumenthals argued that their case was distinguishable from *Zeran* in that AOL had a license agreement with Drudge and retained some editorial rights over Drudge’s posts, whereas AOL had merely been a passive actor with regard to the anonymous

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118. *Blumenthal*, 992 F. Supp. at 47.
119. *Id.*
123. *Id.* at 46.
124. *Id.*
posts that resulted in Zeran's tormenting. The court reluctantly rejected this argument. Although conceding that AOL would certainly be considered a publisher or at least a distributor at common law, the court noted that "[i]n some sort of tacit quid pro quo arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-policing the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted." Thus, according to the district court, an ISP is immune from suit even when defamatory content is provided by an ISP's business partner, as opposed to an anonymous third party.


In *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, the Tenth Circuit immunized an ISP from liability even when the ISP actively took part in developing the false statements. *Ben Ezra* involved AOL's Quotes & Portfolios service, where stock quotation information was continuously updated throughout the day. While two independent third parties provided the information to AOL, AOL sometimes deleted or edited the information. Plaintiffs, a company about which AOL had provided inaccurate information, argued that this rendered AOL both an interactive computer service and an information content provider.

The Tenth Circuit disagreed. Even though AOL did work with third parties to correct errors in its publication, the Tenth Circuit held that "Plaintiff has not demonstrated Defendant worked so closely with ComStock and Townsend regarding the allegedly inaccurate stock information that Defendant became an information content provider." The court explained: "By deleting . . . symbols, however, Defendant simply made the data unavailable and did not develop or create the stock quotation information displayed." Thus, even though the CDA defines an information content provider as "any person or entity that is responsible, in
whole or in part, for the creation or development of information," the court nonetheless found that AOL was not an information content provider.

d. Closing Thoughts

Taken together, these three cases comprise a very broad grant of near-immunity for an ISP. An ISP may take an active role in the creation of content through edits and still retain its freedom from liability under the CDA. Although a few courts have deviated from the Zeran-Blumenthal-Ben Ezra line of cases, most courts have not. Thus, in almost all parts of the country, an ISP can feel secure that it will not be held liable for publication of content, even when it takes an active role in the publication of the content. While this virtual immunity ends almost all concern for a large company, it still does not remove the threat of very real injury to bloggers and other denizens of the “new internet.”

III. UNIQUE PROBLEMS RELATING TO DEFAMATION IN THE “NEW INTERNET”

While cases have long existed involving defamation claims as a result of chat rooms or message boards, almost all of those cases have involved large companies being sued. But what happens when the defendant is a smaller company, or even a sole proprietor? These entities are especially vulnerable to Strategic Lawsuits Against Public Participation, or SLAPPs. In an era where the vitality of the internet is increasingly dependent upon such small entities, the chilling effect posed by vindictive litigation is uniquely threatening to a medium that Congress has declared to be protected pursuant to the public policy of the United States. This section analyzes the chilling effect that SLAPP lawsuits potentially have on bloggers and other small companies, and examines a recent example of such a case.

133. See supra notes 94-103 and accompanying text.
134. See, e.g., Barrett v. Rosenthal, 9 Cal. Rptr. 3d 142 (Cal. App. 1 Dist. 2004). See also Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003) (discussing, but not deciding, that the CDA removed only publisher liability).
A. Six Years of Silencing John Doe

In 2000, just as blogs were becoming popular, Professor Lyrissa Lidsky published an article entitled "Silencing John Doe: Defamation & Discourse In Cyberspace."136 In it, Professor Lidsky worried that the high costs of litigation would pose a serious threat to the growth of the internet, as frivolous lawsuits were used to silence website publishers. As Professor Lidsky observed, "many defamation actions are not really about money."137 Indeed, as Professor Lidsky notes, a core function of defamation law is to chill speech.138 Because the remedy of injunctive relief is, generally speaking, unavailable to a defamation plaintiff,139 and because libel suits are difficult to win (but are easy to bring),140 a defamation plaintiff's only hope is often to scare the speaker into recanting. Thus, corporations often issue press releases coinciding with their decision to sue, as part of a concerted effort to discredit a plaintiff.141

Lidsky noted the unique threat that the chill of litigation posed to smaller entities. She explained that "chilling-effect arguments have particular resonance in cases involving 'nonmedia' defendants like those typically sued in the new Internet libel cases."142 Lidsky noted that the high cost of litigation alone posed a strong disincentive against continuing an internet commentary.143 If this was true of the internet six years ago, it is only more so today.

With the explosion of small proprietorships in cyberspace, the average internet participant is increasingly vulnerable to lawsuits. When Lidsky wrote her article, most webpages were still in static format.144 With almost all individually-run sites now including vigorous discussion in comments, and some even including message boards or Scoop-style blogs-within-blogs, the potential for

137. Id. at 872.
138. Id. at 888.
140. Lidsky, supra note 94, at 883. Indeed, only 13% of defamation Plaintiffs are successful. Id. at 875.
141. Id. at 876-77.
142. Id. at 888-89.
143. Id. at 891. See also Susan M. Giles, Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation, 58 OHIO ST. L.J. 1753, 1789 (1988) ("[I]t is now clear that chill on speakers comes not just from fear of damage awards but also from concern about the costs of litigation.").
144. See supra note 35 and accompanying text.
a lawsuit against an individual website proprietor is much greater today than it was in 2000.

To emphasize the point, consider the defendants in the seminal CDA cases cited above: CompuServe, Prodigy, and AOL. While none of these major corporations are eager to expend money on litigation, they certainly have the resources to do so if necessary. For the average blogger, this is simply not the case. Given that the average associate salary at many large firms is around $300 per hour, a motion to dismiss and reply brief that took forty hours to write, edit, and file would place the cost of litigation at $12,000. This assumes the associate did all of the work, no oral argument is granted, and no discovery is served with the motion. If a partner edits the brief, her $500 per hour rate would break the bank for most individuals.

Cost is not the only concern for the average blogger. While most large corporations have some sort of in-house legal function to give advice on these matters, the average blogger – indeed even large-scale bloggers – do not have such niceties at their disposal. Unless the blogger is fortunate enough to have a loyal legal following on his blog, he may not be aware of the CDA limitation on his liability, or have any clue how to respond to a complaint or cease-and-desist letter. The average American, in the author's experience, is quite uncomfortable with the legal system; faced with a demand for litigation, most people may well conclude that it is simply not worth it, and remove the offending post. Even obtaining competent representation is a concern – many lawyers who are within the cost range for an individual Defendant will be unfamiliar with the intricacies of defamation law, and perhaps even with the CDA provisions. Thus, for the average citizen, the mere threat of a lawsuit can spell financial ruin. In such circumstances, removing the speech is the logical course of action, regardless of the merits of the lawsuit.

B. Examples of SLAPP Lawsuits Involving Small Entities

These concerns are not merely theoretical. Two lawsuits serve as examples of how a clever plaintiff can try to use the threat of litigation to silence non-defamatory speech that it does not like. While the defendants in these two cases fought back, there are certainly numerous examples that go undetected where the defendant merely throws up her hands, and removes the “offensive” material.
1. Finding One's Self in "U-Hell"

The first case is *U-Haul International, Inc. v. Osborne*. In that case, Osborne and his roommate rented a U-Haul truck to move from Florida to Georgia. The truck apparently broke down several times in the course of what would otherwise have been an eight-hour trip. U-Haul also attempted to force the duo to pay for the extra costs and repairs to the truck. After complaining to U-Haul and the Better Business Bureau, the defendants decided to take their case to the internet. Osborne created a site named "The U-Hell Website: Misadventures in Moving." The site operated as a forum where he told his tales, and others could tell their tales as well.

U-Haul sued defendants, not in Georgia or Florida, but rather in Arizona, on the theory that defendants had "published" there. According to Lidsky, this was a strategic ploy to increase the cost of litigation, by forcing defendants to travel cross-country for hearings and to deprive them of local counsel. Fortunately, the ACLU of Arizona stepped in to defend the defendants, at which point U-Haul promptly dropped the suit, and threatened litigation in Georgia. It is unclear how this lawsuit was eventually resolved. It seems obvious, however, that U-Haul's decision to bring the suit in an inconvenient forum until competent counsel appeared in that jurisdiction belies a strategic decision on U-Haul's part to run up the defendants' costs. While the defendants here decided to fight back, many defendants would simply have acceded to U-Haul's demands.

2. *DiMeo v. Max*

If the facts of the "U-Hell" case are disturbing, a recent case from the Eastern District of Pennsylvania is outright horrifying. *Anthony DiMeo v. Tucker Max* grew out of a series of posts on the popular internet message board "Tuckermx.com." Anthony Di-Meo, III, is the owner of several companies, including a blueberry

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145. No. CIV 98-0366. There does not seem to be a version of this case available online, so I base my analysis entirely on the explication found in Lidsky, *supra* note 94, at 891-93.
147. *Id.*
148. *Id.* at 891.
149. *Id.*
150. *Id.* at 892.
farm (DiMeo Farms, LLC), and a promotions company (Renamity, Inc.). In his own words, DiMeo is “a highly respected young professional with a powerful background in public relations, special event production, and multi-media marketing for luxury brands.” In addition, he is a self-described actor and wealth manager.

Tucker Max owns a popular website appropriately named “Tuckermx.com.” Max’s website was initially a “date application page” put up as the result of a lost bet. Over time the site morphed into a collection of stories about Max’s life, and now includes a collection of pictures of Max’s ex-girlfriends, the “Tucker Max Female Rating System,” and Max’s suggested reading list. Max’s site grew from relative obscurity to become one of the most heavily trafficked non-commercial sites on the internet. An “Alexa” search conducted on July 1, 2006 indicates that Max’s site is the 6,069th most heavily trafficked site on the internet. By way of contrast, the website for the Cleveland Plain Dealer – the leading newspaper for one of the nation’s largest metropolitan areas – is not even in the top 200,000 sites. Max is the sole proprietor and author of the site.

TuckerMax.com also contains a message board, which has over 28,000 readers. Discussion on the board is wide-ranging. For example, one thread on “The Advice Board” contains a detailed discussion of postmodernist theory. On the “Pop Culture Board,”

152. Civil Action Complaint (“Compl.”) ¶ 6(e); see also Renamity, http://www.renamity.com/who.html.
153. Id.
154. Id.
members can discuss the children's book “Harry Potter.”\textsuperscript{164} Three clicks away, however, on “Permanent Threads” is “The Porn Thread,” where members (obviously) post links to pornography, and “The Member's Boobie Thread,” which content is similarly obvious.\textsuperscript{165} That message board is at the heart of the controversy in this case.

For reasons that are somewhat obscure, there is a history of confrontation between the denizen's of Max's Message board and DiMeo. Max's message board has been through many iterations, some of which are no longer available through the internet, but it is clear that the conflict was longstanding as of January of 2005, when Max detailed a million dollar lawsuit that DiMeo had filed against the Philadelphia Weekly as a result of a parody of his holiday card by Weekly columnist Jessica Pressler.\textsuperscript{166} The reaction on Max's message board was immediate, visceral, and extended for over fourteen pages.

For example, one poster known as “CJ*” wrote “God, that guy has absolutely ZERO sense of humor. I can't believe no one has killed him yet.”\textsuperscript{167} Similarly, “Wahoo” gives this piece of advice: “Sit down, really look at that picture, and take a deep breath. Stop f*cking imagining yourself as an old-money, world-wise, sophisticated, aristocratic, princely fellow. You're the only one that sees that.”\textsuperscript{168}

From that thread forward, comments on DiMeo's life were a staple of the Tucker Max Message board. Shortly after the above thread went up, a thread was posted soliciting photoshopped versions of his famous holiday card.\textsuperscript{169} Two months later, the message board again mocked DiMeo's lawsuit, in response to a “cease and desist” letter that DiMeo's attorney had sent to the webmaster for the message board, demanding that the board “[k]indly cease and desist from utilizing my client, Anthony DiMeo III, for any content whatsoever on TuckerMax.com or any other Internet outlets for

\begin{itemize}
\item \textsuperscript{165} Tucker Max, http://messageboard.tuckermx.com/showthread.php?t=10 (last visited July 9, 2006).
\item \textsuperscript{166} Tucker Max, http://messageboard.tuckermx.com/showthread.php?t=1414 (last visited July 9, 2006).
\item \textsuperscript{167} Tucker Max, http://messageboard.tuckermx.com/showthread.php?t=1414 (last visited July 9, 2006).
\item \textsuperscript{168} Tucker Max, http://messageboard.tuckermx.com/showthread.php?t=1420 (last visited July 9, 2006).
\end{itemize}
that matter." A poster named "IbrakeForSox" revealed DiMeo's e-mail address and noted that "[h]e's got a neat, nice little page there from which we can all harass him. What a f*cking c*cksmoker." In September, the board again mocked his website.

On New Year's Eve of 2005, Mr. DiMeo threw a New Year's Eve party that some say ended in shambles. According to the district court's opinion, Mr. DiMeo's company threw a party where twice as many people showed up as the company had contracted to serve. According to the district court, when the food and liquor ran out, "[p]atrons seeking food burst through the doors leading into a dining room of Kabir's Le Jardin restaurant. Two mixed-media works on loan by Antonio Puri were stolen from museum walls. Sconces were torn. Someone tried to haul off the donations box. Kabir, fearing injuries, called police about 10:30 p.m." The reaction from Max was immediate. On January 3, Max published an entry on his website entitled "Sometimes Failure Is Funny: DiMeo's NYE Party." In his entry he wrote "[i]t looks like Dimeo had a f*cking disaster at his NYE party, and totally f*cked over everybody who came. Anthony, maybe it's time to stop running from your destiny and go farm blueberries full time!

Defendant provided links to two news stories, one from the Philly Metro's website and one from NBC10 News's website. Nearly two-hundred responses were posted. Some were colorful, to say the least:

- "Anthony DiMeo III . . . owner of local PR company . . . , financial planner, and actor.' a.k.a. A rich kid who just gets to try a whole bunch of sh*t until he f*cks it all up and ends up in the family

171. Id. See also DiMeo v. Max, 433 F. Supp. 2d 523, 527 (E.D. Pa. 2006).
173. DiMeo, 433 F. Supp. 2d at 525 (stating that "Renamity, Anthony DiMeo's publicity firm, organized what turned out to be the New Year's Eve party from hell"; setting forth the events of that night; and citing various articles about the same).
174. Id.
176. Id.
business living with his parents. Way to go you you [sic] lazy-eyed retard!"177

- “So basically this was a party for 700 of the ugliest, slack-jawed, walleyed creatures of the night that reside in Philly;"178

- “I have three words for the owner of the restaurant . . . Breech [sic] of contract! Sue him for all he’s got! Even better, sue him for all he doesn’t [sic]! All those frivolous lawsuits you have against people (not to mention the ones you threatened people with) are finally biting you in the a**, Antnee.”179

- “I’m beginning to think the face he makes in every photo is one of concentration. His good eye sees the camera. He stares at it in shock for a second or two, until realizes that yes, that most definitely is the person he payed [sic] to photograph him. Panic strikes. His lazy eye is firmly fixed upon the photographers [sic] shoe. His mind goes blank, his jaw goes slack. The only thing he can think of is getting not one, but both eyes, on the camera. Then the flash goes, and he fails yet again.”180

- “Grasshopper Recipe. . . . I sh*t you not. 25 ml BOLS – Peppermint (Creme de Menthe) 25 ml BOLS – Creme de Cacao (Clear) 35 ml Double Cream Anybody care to speculate as to the origins of the cream? I didn’t know you could mix the 3 biggest queen liquers [sic] into one cocktail. Guys, did it come with a little umbrella? Seriously. Amazing.”181

DiMeo countered with a lawsuit filed in Pennsylvania State Court, which Max promptly removed to the Eastern District of

177. Id. at 1 (statement of “footinmouth”).
178. Id. at 2 (statement of “moist_panties”).
179. Id. at 4 (statement of “leavemealone”).
180. Id. at 10 (statement of “downwiththepants”).
181. Id. at 15 (statement of “Ribalding”).
Pennsylvania. DiMeo objected to six posts made on the message board, none of which were made by Max. DiMeo sued for various sorts of defamation.

DiMeo also brought suit under provisions of the Violence Against Women Act, signed by President Bush on January 5, 2006, which makes it a crime to "make[] a telephone call or utilize[] a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications." Mr. DiMeo's lawsuit is arguably the essence of a SLAPP. First, the Third Circuit had already determined that the CDA removed both publisher and distributor liability from an ISP such as Mr. Max. In Green v. AOL, the Third Circuit wrote:

There is no real dispute that Green's fundamental tort claim is that AOL was negligent in promulgating harmful content and in failing to address certain harmful content on its network. Green thus attempts to hold AOL liable for decisions relating to the monitoring, screening, and deletion of content from its network - actions quintessentially related to a publisher's role. Section 230 "specifically proscribes liability" in such circumstances.

DiMeo's cause of action under the VAWA Re-authorization was even worse. As Judge Dalzell noted, "DiMeo bases Count Two on a criminal statute, and he does not even try to show that § 223(a)(1)(3) provides a private right of action." Moreover, Max did not post anonymously, as required by the statute, and as

183. Id. The relevant comments on Mr. Max's website are as follows:
   (a) "Maybe you should find your validation elsewhere . . . preferably at the end of a magnum";
   (b) "I just wanted to let you know that I think that you are the biggest piece of sh*t I have ever heard of and I hope that you die soon";
   (c) "Now I know why Arlen Specter got invited to all those Renamity parties! Could it be . . . bribery of your local politician";
   (d) "He's got a neat, nice little page there from which we can harass him";
   (e) "I can't believe no one has killed him yet";
   (f) "You threw an absolutely disastrous party on New Year's Eve precipitated by false advertising and possible fraud."

Judge Dalzell noted, the VAWA Re-authorization contains exceptions similar to those in the CDA. 187

Second, DiMeo may well have intended to use the suit to silence or punish Max for speech that he simply did not like. None of the supposedly defamatory statements in the complaint were made by Max, and none of them are particularly defamatory on their face. Notwithstanding this or the thorough drubbing his claim received from Judge Dalzell, DiMeo has filed a notice of appeal, signaling that he intends to bring the matter to the Third Circuit. 188

More importantly, DiMeo has all but admitted that his goal is to run up Max’s legal bills. In response to an e-mail from “Alana” asking “[are you] just being more cautious . . . since you got b*tch slapped by Tucker Max,” DiMeo responded with amazing candor: “Ask Tucker how much he spent on attorney’s fees. Who’s the bitch now? hahaha . . . I’m not done with Tucker and his following of losers. The legal suits are comin. Hold on to your seats. The fun has just begun.” 189 Another MySpace commenter asked Mr. DiMeo how the lawsuit against Max was proceeding; DiMeo responded that it was “going quite well,” that he intended to pursue litigation against the other posters, and that “[e]ither way. [sic] I win,” because posters would each have to spend “at least $50,000 each in legal fees.” 190

Max’s website is large enough that he generates a fair amount of traffic, from which he generates substantial ad revenue. He is most likely able to cover his costs. Moreover, his status as a former law student seems to have garnered him a large following of lawyers, who identified many of the problems with DiMeo’s suit. Such resources are by no means a guarantee that a website operator will avoid liability. Even experts in the field such as Eugene Volokh, for example, initially overlooked the fact that the VAWA reauthorization was only a criminal statute, and that Max was therefore unlikely to suffer any liability. 191 Max has also confirmed that while a single lawsuit was bearable, multiple frivolous suits such as this could pose a real threat to his site. 192

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187. Id.
189. E-mail from Anthony III to “Alana” (May 29, 2006) (on file with the author).
190. E-mail from Anthony III to “Scott” (July 10, 2006) (on file with author).
192. Interview with Tucker Max, conducted June 29, 2006.
IV. FEDERAL ANTI-SLAPP LEGISLATION AS A POSSIBLE SOLUTION TO THE PROBLEM

The current state of the law guarantees victory on the merits for a third party internet publisher, but for the modern internet publisher, that may not be enough. DiMeeo's attorney was not particularly aggressive, and Judge Dalzell moved quickly in dismissing the suit. But this will not always be the case. In many jurisdictions, by the time the judge rules on a motion to dismiss, expensive, time-consuming, and potentially embarrassing discovery will already have taken place. Moreover, there is no guarantee that a case will be dismissed on a 12(b)(6) motion—a clever plaintiff will simply plead that a defendant actually published his own content, or played an active enough role in editing to qualify as a content provider. Clearly, an additional level of protection is needed to nip SLAPP's in the bud. This Article examines some potential solutions.

A. What Not To Do

Before examining anti-SLAPP legislation, it is worth inquiring into other proposed initiatives for cyber-space. Some authors have not "felt the pain" of internet plaintiffs, and have suggested that the protections of the CDA should be constricted, at least to the point of retaining distributor liability for internet publishers.\textsuperscript{193} The problem with this argument is that while the authors are unanimous in their suggestion that someone who is "cyber-libeled" would have no recourse after the CDA, the facts suggest differently. The CDA does not stand as an absolute bar to lawsuits brought as a result of postings on the internet. Rather, it is a bar only against suing the ISP. While a victim of cyber-defamation may not be able to sue the deep pocket, he can certainly sue the poster. Several authors—as well as several courts—have suggested that this is actually not an impossible chore. While forcing an ISP to reveal the identity of anonymous internet speakers raises First Amendment concerns, it is not a \textit{per se} violation of the

First Amendment, especially if the posting is truly defamatory.\textsuperscript{194} Thus, unmasking the defamatory speaker may well be an option.

While the poster may well be judgment-proof, that is beside the point – the goal of tort law is to make a plaintiff whole vis-à-vis a party who caused him injury subject to public policy concerns, not vis-à-vis a party with only a tangential relationship to the injury.\textsuperscript{195} Unless the proprietor of the message board has taken an active role in developing the supposedly defamatory content, the good served by the internet is likely outweighed by the need of the plaintiff to be made whole by a defendant whose relationship to the creation of the defamatory content is marginal at best.

Other proposed solutions have focused on the chill that defamation suits pose in cyberspace, and have proceeded accordingly. Professor Tribe has suggested a constitutional amendment to protect internet sources.\textsuperscript{196} Professor Lidsky has suggested that the opinion privilege\textsuperscript{197} be adapted to cyberspace, and recognize that internet sources by their nature tend to play “fast and loose” with the facts, more readily giving rise to an inference that they are inherently unreliable than are print pieces.\textsuperscript{198} This notion has found some support in the courts.\textsuperscript{199} Indeed, Judge Dalzell made just such a point in \textit{DiMeo v. Max}, writing that “[a]fter viewing the tuckermax.com message boards, which are read by people using screen names like ‘Jerkoff,’ ‘Drunken DJ,’ and ‘footinmouth,’ the intended audience could not mistake the site for the \textit{New York Times}. In short, it palpably is not serious.”\textsuperscript{200}

\textsuperscript{194} Columbia Ins. Co. v. Seescandy.com; Dendrite Int'l, Inc. v. Doe, No. 3; Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001); Jennifer O'Brien, \textit{supra} note 29, at 2758.


\textsuperscript{197} \textit{Supra} notes 66-69.

\textsuperscript{198} See also O'Brien, \textit{supra} note 29, at 2753-54.

\textsuperscript{199} See, e.g., SPX Corp. v. Doe, 253 F. Supp. 2d 974 (N.D. Ohio 2003) (“Such message boards are accessible to anyone of the tens of millions of people in this country (and more abroad) with Internet access, and no one exerts control over the content. Pseudonym screen names are the norm. A reasonable reader would not view the blanket, unexplained statements at issue as ‘facts’ when placed on such an open and uncontrolled forum.”); Global Telemedia Intern., Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001); Doe v. Cahill, 884 A.2d 451 (Del. 2005) (“Blogs and chat rooms tend to be vehicles for the expression of opinions; by their very nature, they are not a source of facts or data upon which a reasonable person would rely.”).

Others have suggested that the public/private figure distinction makes little sense in cyberspace. Indeed, this argument was quite popular when the internet was in its infancy. In Gertz, the Supreme Court put forward two rationales justifying the lower standard of proof for private plaintiffs. First, Justice Powell noted that the public figure generally had some pulpit for rebuttal, something generally not available to the private individual. Second, Justice Powell noted that public figures had interjected themselves into the public sphere, with an eye toward influencing policy. In cyberspace, by contrast, while someone can "libel [someone] instantly in front of one and a half million people," a person can also "post a nearly universal and instantaneous response." Indeed, it appears that DiMeo did just that in response to the initial posts of Mr. Max. This would weaken Gertz's first rationale, at least with regard to a message board or comment-enabled blog where the plaintiff's postings were allowed to remain intact. Also, given the newfound power of the blogosphere to influence policy, it may well be the case that, at least with respect to bloggers, the second prong of the Gertz rationale has been weakened. Accepting such a rationale, however, would arguably have the unintended effect of chilling discourse in cyberspace by encouraging people to remove themselves from the

201. Supra notes 66-69.


204. Gertz, 418 U.S. at 344.

205. Weber, supra note 202, at 262 (quoted in Hadley, supra note 53, at 491). This argument is difficult to assess. A website that did not have comments or that repeatedly deleted a defamed plaintiff's responses would retain the upper hand. A defamed plaintiff could easily build his own rejoinder on blogspot, but it is unclear how much attention this would receive. The most popular search engine on the net – Google – ranks sites by the number and popularity of sites that link to a given site, so a rejoinder may, in fact, go unheard. Still, if a plaintiff does in fact respond on a particular site, or is given a forum on which to respond, this factor may well lead toward a different response in cyberspace than in print media.

206. Interview with Tucker Max, conducted June 29, 2006. Also, Max linked DiMeo's site directly numerous times, giving DiMeo ample opportunity to respond, if he had so desired. Indeed, the first state supreme court case to consider defamation on a blog made similar observations. See John Doe 1 v. Cahill, 884 A.2d 451, 455 (Del. 2005) ("[T]he internet now allows anyone with a phone line to 'become a town crier with a voice that resonates farther than it could from any soapbox."). Of course, one does not even need a phone line for broadband cable internet, or to pick up a wireless signal at the nearest café.

207. See supra notes 5-9 and accompanying text.
internet in hopes of being able to maintain the lower negligence standard of liability. 208

Regardless, while both of these solutions would enhance the ability of publishers to defend themselves, such solutions really only nibble around the edges of the problem this Article identifies. The problem is not, generally speaking, that the internet defendant will not have an easy time defending himself from his own defamatory content. Rather, the problem is that he will have to pay large sums of money to prove his already-clearly-available defense if he is sued either for printing clearly non-defamatory content on his site or for defamatory content posted by others on his website. The focus here is on whether an owner of a successful message board or blog should be forced to make the choice between hiring an army of comment-checkers, or turning off the discourse on his site altogether.

B. Anti-SLAPP Legislation as a Solution to the Problem of “Cyber-Chilling”

Nearly half of the states in the Union have anti-SLAPP legislation of some form on their books, 209 up from sixteen in 2001.210 Perhaps the most famous is California’s. Under the California version of the law, “[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike.”211 The goal of this motion to strike is to allow for early dismissal of meritless cases aimed at chilling expression through costly, time-consuming litigation.212 Thus, under the terms of this statute, the law is construed broadly,213 and the

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208. On yet another hand, one can easily imagine Ken Zeran meeting the actual malice standard – in other words, this would not be a complete removal of the tort of defamation in cyberspace. And indeed neither Zeran nor Blumenthal – nor any defendant arbitrarily picked on by a website who did not maintain a web presence – would be affected by such a change in the law.


211. CAL. CIV. PROC. CODE § 425.16(b)(3).

212. Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 839 (9th Cir. 2001).

213. CAL. CIV. PROC. CODE § 425.16(a).
ability to initiate an anti-SLAPP motion extends even to a non-party's assertion of a right to remain anonymous.\textsuperscript{214}

Upon filing an anti-SLAPP motion to strike, all discovery is immediately stayed, subject to the possibility of a court order "for good cause shown."\textsuperscript{215} The burden is then on the defendant to show that "the plaintiff's suit arises from an act by the defendant made in connection with a public issue in furtherance of the defendant's right to free speech under the United States or California Constitution."\textsuperscript{216} The plaintiff must then show a probability that she will prevail on the claim. The motion is similar to a Rule 12(b)(6) motion to dismiss, in that the defendant is somewhat bound to the facts alleged in the complaint; however he or she is allowed to submit affidavits in support of the motion.\textsuperscript{217} If a party fails on their motion to strike, discovery is no longer tolled, and the case proceeds apace.\textsuperscript{218} If, however, a party succeeds, then he is allowed to recover costs of the litigation.\textsuperscript{219} Similar protections are available to a plaintiff, if the court finds the motion to strike to be frivolous or brought solely for delay.\textsuperscript{220} Finally, immediate appeal is granted from the denial of a motion to strike.\textsuperscript{221}

Such legislation could similarly work on the federal level. Although the general rule in American courts is that attorney's fees are not available to a prevailing party,\textsuperscript{222} the federal statutes are rife with exceptions to the rule. For example, a prevailing plaintiff in a civil rights action is entitled to recover attorney's fees,\textsuperscript{223} while both prevailing plaintiffs and defendants may seek attorneys fees under the Copyright Act.\textsuperscript{224} In many ways, this would merely make cases involving First Amendment rights into another such exception. Similarly, federal courts already have a wide degree of discretion over discovery, and may even choose to stay discovery at the outset if they believe the case is frivolous. A federal anti-SLAPP law would merely be a more stringent version of what al-

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\textsuperscript{215} CAL. CIV. PROC. CODE § 425.16(g).  \\
\textsuperscript{216} Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003).  \\
\textsuperscript{217} Metabolife, 264 F.3d at 840.  \\
\textsuperscript{218} Batzel, 333 F.3d at 1024.  \\
\textsuperscript{219} CAL. CIV. PROC. CODE § 425.16(c).  \\
\textsuperscript{220} Id.  \\
\textsuperscript{221} Id. § 425.16(j).  \\
\textsuperscript{222} See Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).  \\
\textsuperscript{223} 42 U.S.C. § 2000e-5(k); Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).  \\
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It would also help ameliorate the problems described above. With a federal anti-SLAPP law, an individual would not have to submit to costly discovery while waiting for a motion to dismiss to be ruled upon. Moreover, with the possibility of recovering fees, a defendant with empty pockets would be empowered to fight the case, at least at the outset. Finally, by receiving a preliminary ruling from a judge early on regarding the merits of a case, a guilty defendant could be encouraged to settle or recant the defamatory speech, rather than fight on, delaying justice for the plaintiff.

C. Responses to Criticisms

While federal anti-SLAPP legislation may well be a solution to the problems encountered with regard to frivolous lawsuits in the blogosphere, some may counter that Rule 11 sanctions or other statutory provisions such as 28 U.S.C. § 1927 already offer a similar response to frivolous suits. However, a preliminary ruling in Max v. Dimeo indicates just how difficult it can be to win such a sanction.

Max v. Dimeo was filed in Pennsylvania state court on March 10, 2006. Thirteen days later, Max accepted process and removed to federal court on April 12, 2006. DiMeo moved to remand, arguing that because thirty days had passed since Max first became aware of the lawsuit and saw a copy of the complaint—apparently from a third party news source—his time for removal had run.

The problem with this argument is that it had been squarely foreclosed by the Supreme Court in Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc. Max's attorney sent a letter to DiMeo's attorney, Matthew Weisberg, informing him of this case law, and the hopeless nature of his case. Max then moved for sanctions, arguing that the motion was frivolous. The Court demurred. The Court noted in unusually strong language that

226. Id.
227. Id. See also 28 U.S.C. § 1446(b).
229. Order, at 3.
Weisberg’s actions had been at the very least on the borderline of sanctionable:

(p) to be sure, Weisberg exercised very poor judgment; (q) [b]y refusing to withdraw such a frivolous motion Weisberg forced counsel at a major Philadelphia law firm to do legal research, write a formal response, and then file it – all at a cost to Max; (r) Weisberg also wasted the time of the Court and, in turn, the United States taxpayers; (s) Weisberg’s poor judgment is compounded by his request to file a supplemental brief; (t) [e]xpecting that Weisberg would use this opportunity to withdraw the petition, we granted his request; (u) [i]t was thus surprising indeed when Weisberg subsequently advised us – just ten minutes before his brief was due – that he had decided not to avail himself of the very opportunity he himself requested; (v) [i]n short, Weisberg’s actions reflect a blatant disregard for the time of opposing counsel, his client’s adversary, and this Court, and he would be well advised to change his ways the next time he appears in federal court.\(^2\)

Even given these egregious facts, however, the Court found that sanctions were not appropriate, given the high Third Circuit standard.\(^3\) One is left to wonder what standards would justify sanctions, if an attorney who is put on notice of the frivolous nature of his suit or motion refuses to withdraw the suit or motion. A federal anti-SLAPP rule would remedy this problem, at least where fundamental First Amendment freedoms are at stake.

A stronger objection is that the fee-shifting arrangement in the statute may well chill plaintiffs from seeking redress.\(^2\) As one author eloquently writes:

“SLAPP” . . . is, both on its face and as discussed in the literature, a pejorative term that vilifies the motives of the plaintiff and idealizes the motives of the defendant.

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\(^2\) Id. at 4.

\(^3\) Id. at n.1; see also Baker Indus. Inc. v. Cerberus, Ltd., 764 F.2d 204, 208 (3d Cir. 1985) (noting that to justify sanctions, the conduct must be “of an egregious nature, stamped by bad faith that is violative of recognized standards in the conduct of litigation”).

The onesidedness of this presentation raises the specter of the tyranny of a zealous majority over the hapless plaintiff who is despised because that plaintiff's case happens to resemble the paradigm SLAPP. 233

There is, of course, truth to this criticism. Plaintiffs who have valid-yet-borderline claims may well decide not to bring suit because of the fear of being forced to pay a defendants' legal bills, especially if the defendant is a large corporation. But such tradeoffs are present in all legal matters, and indeed it is difficult to see why a defamation defendant should get less protection than, say, a copyright defendant. The choice between forcing a wronged plaintiff to go uncompensated because he does not want to pay legal bills if he loses, or forcing an innocent defendant to remove constitutionally protected speech because he cannot afford his own legal bills if he wins, strikes the author as a relatively easy choice. Under an anti-SLAPP statute, the plaintiff is ultimately only forced to incur cost if he has, in fact, brought a lawsuit that is unlikely to succeed. The defendant, however, will always incur substantial costs absent an anti-SLAPP statute. More importantly, he will have done so in the exercise of his First Amendment rights. At the very least, this is only an attack on the fee-shifting portions of the California Act – even simply providing for a stay of discovery and an expedited preliminary hearing could go far to validate the rights of a defendant, especially a sole proprietor such as a modern blogger.

Finally, one could object that this is a decision for states to make, and not the federal government. While there is some truth to this, all too often this argument is reductionist in its nature. Some things truly are best left to the states, but it by no means follows from that that all things must be left to the states. Here, we are presented with a situation where a federally guaranteed right is being chilled. Surely, it is the emphatic duty of the federal government to ensure those rights are being protected. Also, this is a situation where states are fulfilling their roles as laboratories of democracy; the federal government can now look at the results in a state such as California versus a state such as Pennsylvania, decide that it would prefer to see a message board proprietor such as Mr. Max protected from frivolous lawsuits as he would be in California no matter where he resides, and enact a federal statute.

233. Id.
V. CONCLUSION

The advent of the blogosphere is an exciting development for the country, and indeed for the world. Persons in America may now read and even offer commentary upon unfiltered firsthand accounts of the war in Iraq from an Iraqi, may follow an otherwise-unknown chef's recipes on a daily basis, or observe the exploits of an obscure computer programmer in Louisiana as he restores his dream car. Truly, this is a degree of freedom of and access to information about which previous generations had only dreamed. To keep this newfound freedom intact, however, requires a certain degree of vigilance. New threats will crop up that no one had anticipated, and old threats will resurface in new forms. The Strategic Litigation Against Public Participation is just such a threat. As the lawsuit against Tucker Max shows – and as earlier suits against the U-Hell plaintiffs show – plaintiffs can use the mere threat of litigation as a powerful weapon to silence points of view that they do not like, even points of view that are clearly protected by Congressional action, or by the First Amendment. A federal statute that placed some type of premium on bringing such an action would certainly go a long way toward remedying the harm such actions cause.
