When Libel Claims Punish Free Speech on the Internet
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Reflecting on David Carr's recent Media Equation column about Crystal Cox, a blogger found liable for defamation ("When Truth Survives Free Speech," 12/11/11). Assuming Carr's piece and the jury's findings were correct, that the blogger intentionally fabricated baseless factual claims out of whole cloth, this is the kind of extreme conduct that even our nation's most protective First Amendment rules do not condone.

As a media lawyer, I generally defend the right to speak and publish. However, there are instances, like the case of Crystal Cox has been reported to be, where liability for knowing falsification legitimately trumps even the broad latitude for free speech recognized under the modern law of defamation in the United States.

As one example, some years ago my firm represented a small company whose business was being damaged by a fabricated story posted on a popular consumer gripe website. An anonymous Internet poster claimed that the company was being investigated for serious criminal wrongdoing by the government. There was no such investigation and no such wrongdoing and never had been. Unfortunately, due to the popularity of the hosting site, the bogus claim not only misled the site's many readers. In Internet searches the fake allegation also came up higher than the company's own website. Obviously, a problem for the business requiring a solution.

But it would be a disservice to your readers to leave the impression that for every allegation of defamation on the Internet there is some outrageous fabrication that justifies legal action. In too many cases, corporate interests or powerful individuals invoke libel laws in an attempt to punish or suppress the freedom to comment on real issues and concerns. Blogging may be unruly, hyperbolic, irritating, at times perhaps even dubious. But most often it simply reflects the blogger's genuine grievances and honestly-held opinions, be they spot-on, wrongheaded or something in between.

The subject of blog commentary may or may not also genuinely feel aggrieved. But defamation law in our country protects the expression of personal opinions. The philosophy of our system of free expression is that the subjects of negative opinions should respond to what they may consider unfair criticism in the court of public opinion. To condone legal retaliation against Internet speech as a matter of course, on a theory that the truth or falsity of every negative blog is fair game for challenge in a libel courtroom, would undo such speech-protective principles. It would free powerful interests to punish their critics – and also to chill future criticism – by imposing the heavy costs inevitably associated with even meritless lawsuits. We should think long and hard before facilitating public relations courtroom counter-offensives that are often legally-baseless under existing law and always oppressive. "We sued the bastards!" does not always mean there was a proper basis for suing the bastards.

A few years ago, for example, my firm represented a blogger in a libel suit by a former public official. The claim focused on posts critical of a local agency that was considering the official's private development plans. In the context of the pending public dispute, and with obvious anger and hyperbole, the blogger complained among other things that the proposed development was

an "illegal scam." And it opined that the official's publicly-reported political contributions to the incumbent administration were effectively "bribes" that were "greasing the wheels of corruption."

We were able to "summarily" defeat the official's claim by invoking the state's anti-"SLAPP-suit" law. But in the course of the action the blogger lost his constitutional right to express opinions anonymously. And in the end the court declined to order reimbursement for the many thousands of dollars in legal fees and costs we had incurred in defeating claims that the court held were without substantial basis in either fact or law.

In a pending case, we are representing posters of information whose obvious intent was to ridicule a large company that had been accused of overbilling the government for services. It is undisputed that the company had settled two cases initiated by the government's "fraud" control agency for large sums of money. The posters labeled the company's actions "fraud," but in an obviously opinionated fashion. Technically, however, the overbilling claims had been settled without any finding or admission of liability for fraud.

A news media story might have hedged use of the word "fraud" with one or more judiciously placed "alleged's." But careful hedging is hardly in the tradition of blogging on the Internet and everyone knows it. In fact, a growing body of case law has wisely recognized that the Internet is the home of free-wheeling and often hyperbolic overstatement, properly understood in that context as conveying opinions, not facts. Reasonable Internet readers and viewers simply do not expect – nor should they – that every blog post will have the same factual precision as the legally-vetted news stories they might find on CNN.com.

Despite this, in our current case the offended company is pressing its legal claims, intent on uncovering the identity of the anonymous posters so it can sue them for defamation. And when the dust settles, even if we defeat that case in the first round, substantial legal fees will have been incurred and it is uncertain that they will ever be reimbursed.

Nearly fifty years ago, in the landmark civil rights era case of Times v. Sullivan, decades before the Internet era, U.S. Supreme Court Justice William Brennan wisely recognized that it was vital to our American democracy to vigorously protect "open, robust and wide-open" freedom of expression from the chilling effects of libel claims. Justice Brennan understood that free speech requires "breathing space" to survive.

Today, we like to imagine that the open and democratizing "wild west" spirit of the Internet is hardy and permanent. But just as the free-wheeling structure of the early Internet has rapidly succumbed to commercialization and corporate control, we should take care not to invite another new sheriff into Dodge. Replacing the Internet's empowering freedom to fearlessly communicate everyman's opinions, with a regimen of purported journalistic "responsibility," is really just another name for censorship.

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