THE MEDIA SLAPP BACK: AN ANALYSIS OF CALIFORNIA'S ANTI-SLAPP STATUTE AND THE MEDIA DEFENDANT

London Wright-Pegs[1]

I. INTRODUCTION

Should the media[2] be entitled to the same level of protection as local citizens in terms of free speech, or are the media already too powerful and intrusive? Since the 1980s, public anxiety gradually has grown over lawsuits designed to "silence" or "punish" a party from exercising free speech or the "right to petition the government."[3] These

[1] London Wright Pegs is a third year law student at UCLA School of Law, emphasizing in the Entertainment Law Concentration. She would like to thank the 1st amendment attorneys at Davis Wright Tremaine, LLP for their helpful insight into anti-SLAPP litigation and Professor Ginsburg for his endless feedback.

[2] *Note*: For purposes of this paper, "media" and "press" will be used as if they have the same meaning and thus commonly exchanged.

[3] Margaret G. Tebo, *Offended by a SLAPP: As Lawsuits Against Citizens Expand, Countermeasures Are Rolled Out*, A.B.A., Feb. 2005, at 16.

suits are called Strategic Lawsuits Against Public Participation ("SLAPP").[4] SLAPP suits are often brought by powerful individuals or organizations against citizens or community groups who petition local government, to discourage the petitioners' complaints. The powerful plaintiffs often claim they have either been defamed or had their right to privacy invaded, even though the conduct in question is protected by the First Amendment.[5] As a response to harassing lawsuits filed by powerful organizations against less powerful citizens, many states have passed anti-SLAPP legislation.[6] However, only a few states have anti-SLAPP statutes that protect "broader First Amendment rights;" i.e. freedom of the press that does not solely concern governmental issues but also issues of broader public concern. California is one of these states.[7]

In 2007, a California state court judge dismissed a case against the creators of *Borat*, Sacha Cohen's Golden Globe-winning film.[8] The plaintiffs in this lawsuit, *John Doe v. One America Productions*, were two fraternity brothers who appeared in *Borat* during a segment where they were drinking alcohol and espousing racist and sexist views.[9] Following the movie's release, the fraternity brothers filed suit, claiming that they had not given permission to the film's producers to air their views.[10] The plaintiffs admitted that they had agreed to be in the movie and had signed releases, but argued that their consent "was based on the [condition] that the film would not be aired in the United States."[11] Thus, they claimed that the producers and Sacha Cohen had invaded their right to privacy, portrayed them in a false light, and caused them emotional distress.[12] The judge subsequently dismissed the case under California's anti-SLAPP law, holding that the statute applied to the plaintiffs because their racist and sexist views stated in the film were

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[4] California Anti-SLAPP Project, http://www.casp.net/ (last visited Jan. 18, 2009).

[5] *Id.* This description states the most commonly held definition for a SLAPP suit and thus supports the Legislature's intent in creating the anti-SLAPP statute – to protect these individual citizens' right to engage in free speech.

[6] Edward P. Sangster, *BACK SLAPP – Has the Development of Anti-SLAPP Law Turned the Statute into a Tool to be Used against the Very Parties it was Intended to Protect?*, 26-SEP L.A. Law.37, 37 (2003).

[7] Cal. Code Civ. Proc. § 425.16(a). This statute defines its protected activity as "any conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

[8] *John Doe v. One America Productions*, Inc. 2006 CA Sup. Ct. Pleadings 91723; 2006 CA Sup. Ct. Pleadings LEXIS 984, at *5, (2006). This document is the actual complaint stating the facts and "summary of action."

[9] *Id* at *5-*8.

[10] *Id.*

[11] *Id* at *7-*9.

[12] *Id.*

"issues of public interest."[13] Thus, because the anti-SLAPP law applied, the plaintiffs had "to show a 'probability of prevailing' on their claims," forcing them to argue the merits of their case in trial.[14]

Under California's anti-SLAPP statute, a defendant is permitted to file "a special motion to strike a claim arising out of 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 or an issue of public concern."[15] Once the defendant files this motion, a judge is then allowed to "decide at the outset of the suit" whether the plaintiff has a "probability of winning" based on the claim.[16] If it is found that the plaintiff's claim is unlikely to prevail, then the SLAPP must be dismissed.[17] Accordingly, before California's recent changes, SLAPP defendants were also awarded legal defense costs and attorney's fees.[18]

In another California case, *Dyer v. Childress*, the court ruled that the anti-SLAPP statute did not protect the media, a result contrary to the ruling in the *Borat* case. *Dyer* involved the film *Reality Bites*, where one of the defendants, the writer of the film, was the plaintiff's childhood friend and had named one of the characters in the film after the plaintiff.[19] The plaintiff, Dyer, sued the defendants for defamation and invasion of privacy because the character named after him was portrayed as a "rebellious slacker," embarrassing Dyer.[20] In response, the defendants claimed that the anti-SLAPP law should apply because the commentary in the film with respect to this character concerned broader issues facing Generation X, which the defendants contended should constitute "issues of public interest."[21] However, the court dis-

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[13] Jonathan Melber, *Judge to Borat: "High Five!,"* MANATT, Mar. 19, 2007, http://ww;w.manatt.com/news.aspx?id=4554. This article discusses how the California judge "threw out" the *Borat* lawsuit and the Judge's decision, stating the court "held that the statute applied to the plaintiffs' claims because 'the topics addressed and skewered in the movie – racism, sexism, homophobia, xenophobia, anti-Semitism, ethnocentrism, and other society ills – are issues of public interest'."

[14] *Id.*

[15] Cal. Code Civ. Proc. § 425.16(a).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Dyer v. Childress*, 147 Cal. App. 4th 1273, 55 Cal. Rptr. 3d 544, 2007 Cal. App. LEXIS 260 (Cal. App. 2d Dist., 2007)

[20] Peter Lattman, *California Court Doesn't SLAPP "Reality Bites" Lawsuit*, WSJ BLOGS, Feb. 28, 2007 http://blogs.wsj.com/law/2007/02/28california-appeals-court-doesn't-slapp-reality-bites-lawsuit (last visited Jan. 18, 2009). This article states that the Reality Bites lawsuit is "center[ed] on Ethan Hawke's role not as a rebellious Russian rich boy but as a rebellious American slacker named Troy Dyer in the 1994 Gen-X classic *Reality Bites*."

[21] *Id.*

agreed and held that "the anti-SLAPP statute did not apply" because the particular character in the film and his life were not of public interest, and thus such content did not warrant free speech protection.[22]

Despite the divergent results, these two cases illustrate the essential purpose of the anti-SLAPP law, i.e., to protect free speech regarding "issues of public concern."[23] However, of the 26 states and one territory that have anti-SLAPP legislation, California is one of the minority states that has a broad statute containing language allowing the potential for the media defendants' usage. Most states have more narrowly tailored statutes that either limit the use of anti-SLAPP law to particular types of individuals (i.e., where the plaintiff is either a "public applicant or permittee"), or states have limited the use of anti-SLAPP law to specific sets of circumstances (i.e., where the protected activity includes "oral or written statements concerning government bodies" and/or proceedings).[24]

This paper argues that anti-SLAPP law should not be limited to a specific type of defendant; groups and corporations that promote free speech, like the media, should be allowed to use anti-SLAPP law as well. Legislation like California's that tracks protection for the media is important, since knowledge is both heavily disseminated and gained through the media. Although it is recognized that anti-SLAPP protection was initially intended to protect individuals, not media corporations, the free speech rights of media outlets need to be secured because media outlets are oftentimes the primary sources that keep people informed about issues of public concern.

However, corporate media's exploitation of anti-SLAPP protection compels critics to ask whether this new usage actually promotes free speech or chills it. Some critics question whether the media's usage of anti-SLAPP law conflicts with the legislature's intent, amounting to abuse by the media since media corporations can exercise considerably more clout than a local citizen. This paper will attempt to resolve the tension between the intent behind the creation of anti-SLAPP statutes and the need for protection of oftentimes powerful media defendants. This paper will argue against the feared notion that this recent

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[22] *Id.* This article states Justice Joan Klein's decision for holding in favor of Dyer, stating "In sum, assuming the issues facing Generation X at the start of the 1990s are of significant interest to the public, Dyer, a financial consultant living in Wisconsin who happened to have gone to school with Childress, was not connected to these issues in any way."

[23] Cal. Code Civ. Proc. § 425.16(a).

[24] N.Y. Civ. Rights Law §70-a (1), 76-a (1) (a)-(b). The New York statute limits its scope to "public applicant[s] or permittee[s]" which are termed as "any person who has applied for or obtained a permit, zoning change, lease, license certificate or other entitlement for use or permission to act from any government body." *Id.*

trend of anti-SLAPP suits brought by the media will actually chill free speech; instead, it will demonstrate that the media's usage of the anti-SLAPP statute protection encourages free speech, especially speech concerning "public participation" and deliberations over vital public issues, which is exactly what legislatures had in mind when creating these statutes.[25] Thus, anti-SLAPP protection should not solely be available to individual citizens, the legislation's intended users, but also to corporate media defendants.

Part II of this paper discusses the history of both SLAPP and anti-SLAPP litigation and the California legislature's motive in creating the anti-SLAPP statute. Part III analyzes Supreme Court precedents which protect the media's First Amendment rights. Part IV discusses three distinct definitions of protected activity covered under the anti-SLAPP statute, acknowledging the different states' allowance of anti-SLAPP law. Part V focuses on the media's role as a party in SLAPP/anti-SLAPP litigation. Part VI concludes this paper by arguing for the media's usage of the anti-SLAPP statute and proposing a more reasonably tailored anti-SLAPP law that will allow usage by media defendants as the broad California statute does while also staying true to the legislature's intent as well as preventing abuse of the statute. In addition, this paper will argue against the view that the legislature intended for anti-SLAPP protection to be reserved solely for the local powerless citizen conflicting with the media, and will also counter claims that permitting the ability of large media powerhouses to use anti-SLAPP defenses will result in a chilling effect on speech.

II. Background on SLAPP & Anti-SLAPP Law

The term "SLAPP" stands for "Strategic Lawsuit Against Public Participation."[26] It was coined by two University of Denver professors, Penelope Canan and George W. Pring.[27] A SLAPP suit is often considered meritless in that it "is intended to intimidate and silence" a party from engaging in free speech "by burdening them with the cost of a legal defense until they abandon their criticism or opposition."[28] Pring and Canan describe the classic SLAPP lawsuit as targeting a "non-gov-

[25] Cal. Code Civ. Proc. § 425.16(a). The statute "protects against litigation aimed at chilling freedom of speech by providing a summary procedure" where a defendant can quickly rid of the suit at an early stage, evading the large expenses and time that a suit like this entails. Professor David Ginsburg, *SLAPP and Anti-SLAPP*, University of California School of Law, (Spring 2008).

[26] Strategic Lawsuit Against Public Participation, http://en.wikipedia.org/wiki/SLAPP (last visited Jan. 18, 2009).

[27] *Id.*

[28] *Id.*

ernment party" on an issue of considerable social importance involving local citizens who take a position on a particular public issue and express their views in the "public arena." The party opposing the citizen or group decides that, rather than fight the citizen publicly, it will fight that individual or group in the "private, legal arena" of the courtroom. There, the party initiating the SLAPP suit will sue the citizens for their public petitioning, ultimately trying to challenge their free speech rights.[29] As suggested by this definition, a plaintiff bringing a SLAPP suit is "not [necessarily] interested in winning the case," but rather in silencing the defendant.[30] Essentially, a SLAPP suit is used only to set back and distract individuals and to punish those who argue publicly against the actions of corporations or the government by imposing financial burdens on such parties.[31] The main point of the suit is therefore "to punish or retaliate against citizens who have spoken out against the plaintiffs."[32] To further their strategy, plaintiffs use the discovery process to impose costly and time-consuming depositions and interrogatories upon defendants, causing the defendant to waste time and resources. Claims that regularly appear in SLAPP litigation include libel, slander, defamation, abuse of process, malicious prosecution, conspiracy, invasion of privacy, and tortious interference with contract or business relationships.[33] The most common SLAPP suits concern a powerful corporation suing local citizens for speaking against their company.[34]

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[29] Pring & Canan, *SLAPPS: GETTING SUED FOR SPEAKING OUT*, 203 (1996). *Id* at 8-11. According to Pring and Canan there are two arenas – the "private legal arena" which is the courtroom, and the "public political arena" which is outside the courtroom. For the large corporations, they aim to fight in the matter "privately" rather than "publicly" so that they will not further defame themselves and also to burden the petitioning party with a costly suit.

[30] *Id.*

[31] *Gordon v. Morrone,* 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992). In this case, the court states, "The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success," suggesting the sole purpose of SLAPP litigation is to impose heavy financial burdens on the defendant, thereby silencing the party.

[32] Stephen L. Kling, *Missouri's New Anti-SLAPP Law*, 61 J. Mo. B. at 124. In this article Kling states, "The primary purpose of a SLAPP lawsuit is not to resolve the allegation in the petition, but to punish or retaliate against citizens who have spoken out against the plaintiffs in the political arena and to intimidate those who would otherwise speak in the future."

[33] Shannon Hartzler, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant, 41 Val. U.L. Rev. 1238-1239 (2007).* In this article Hartzler states, "An individual or organization bringing an action to silence the media is often asserting a claim of defamation, invasion of privacy, or intentional infliction of emotional distress—defamation in particular being one of the most common complaints in SLAPP litigation."

[34] *Id* at 1240.

SLAPP suits essentially aim to silence those challenging the powerful on issues of public concern. According to New York Supreme Court Judge Colabella in reference to a SLAPP suit, "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined."[35] Essentially, Judge Colabella is speaking to the effect the SLAPP suit has on petitioning citizens—it is essentially forcing them to not speak by burdening the citizens with a costly suit, or threatening to do so. This is a problem because the threat of a suit is often all it takes to silence the petitioning activity of people who would otherwise seek to be actively involved in government affairs.[36] Essentially, these suits are a national crisis—they have effectively forced defendants to settle rather than defend their First Amendment rights due to the lack of money and "emotional stamina" needed to "play out the game."[37]

Although "no direct equivalent of a SLAPP statute in U.S. federal law" exists, 26 states and one U.S. territory have enacted anti-SLAPP legislation to correct the abuse of SLAPP suits.[38] These states have drafted and interpreted their anti-SLAPP statutes differently. Some states, such as California, have drafted broad anti-SLAPP laws, while other states have drafted narrow or moderate anti-SLAPP legislation which limits the protected activity to a specific class of cases. Generally, anti-SLAPP laws consist of a method for "early procedural review" and a "mandatory award of attorney's fees" for the defendant using the anti-SLAPP statute as a defense if the judge rules in their favor.[39]

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[35] *Strategic Lawsuit Against Public Participation*, http://en.wikipedia.org/wiki/SLAPP, (last visited Jan. 18, 2009).

[36] Gordon v. Marrone, 590 N.Y.S.2d 656 (N.Y. Sup. Ct. 1992). According to this case, "The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success."

[37] Shannon Hartzler, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant, 41 Val. U.L. Rev. 1241 (2007).* According to Hartzler, "SLAPP suits are a national problem because they have been very effective."

[38] States that have anti-SLAPP protections are: "Arkansas, Arizona, [California, Colorado,] Delaware, Florida, Georgia, Guam, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Washington [and]. . . West Virginia." *Strategic Lawsuit Against Public Participation*, http://en.wikipedia.org/wiki/SLAPP, (last visited Jan. 18, 2009). This article list 25 of the states, failing to mention California, although it is later acknowledged, and stating that, "In Colorado and West Virginia, the courts have adopted protections against SLAPPs," suggesting that these states do not have outright statutes as the others listed do.

[39] Shannon Hartzler, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant, 41 Val. U.L. Rev. 1242 (2007).* According to Hartzler, "Common features of anti-SLAPP laws include a mechanism for early procedural review and a mandatory award of attorney's fees for a party whose motion to dismiss under the statute is successful."

Although one of the purposes of anti-SLAPP statutes is to quickly throw out meritless suits that are meant solely to silence a petitioner, the main challenge state legislatures face in drafting an anti-SLAPP statute is that it is difficult to craft statutory language to carry out this purpose. By defending one person's "right of petition," the statute intrudes on the opposing person's "right to petition" even if that party may not be fraudulently petitioning, thus creating a problem for judges and complicating the anti-SLAPP law's application.[40] Additionally, these statutes change procedural and substantive law in an extensive way:

A matter may be within the letter of a statute and not come within its spirit, if the matter is beyond the mischief intended to be reached or if to include it would require a radical change in established public policy or in the existing law and the act does not manifest any intent that such a change should be effected.[41]

Because of such challenges to anti-SLAPP statutes, both legislatures and courts have tried to create statutes that are fair for "all the parties' [rights] involved."[42] Certain states, such as California, have drafted broad anti-SLAPP laws but allow their courts to narrowly interpret the statute if they decide to limit its reach, whereas other states have drafted narrow anti-SLAPP laws which limit the statute's reach directly.[43] For instance, in opposition to "California's broad protection," only suits brought by a specific group, "public applicants or permittees," meet the criteria of a SLAPP suit under New York's statute.[44]

In states with broad anti-SLAPP protections for free speech, anti-SLAPP laws have been used in cases other than common SLAPP cases.[45] For instance, media companies have tried to invoke the statute as protection for their ability to perform free speech in written or

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[40] *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 943 (Mass. 1998). This case addresses the unfairness of Massachusetts's anti-SLAPP law in allowing one party to petition its case while not allowing the other.

[41] *Commissioner of Corps. & Taxation v. Dalton,* 304 Mass. 147, 150, 23 N.E.2d 147 (1939); *supra* note 39.

[42] Shannon Hartzler, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant, 41 Val. U.L. Rev. 1243 (2007).* According to Hartzler, in referencing Georgia's anti-SLAPP statute, "legislatures have sought to draft. . . anti-SLAPP statutes that protect the rights of all the parties involved."

[43] *Id.*

[44] *The State of State Anti-SLAPP Laws*, http://www.dwt.com/related_links/adv_bulletins/CMITFall1999AntiSLAPP.htm (last visited Jan. 18). 2009). This article discusses three particular states laws that signify the key differences among states – the "California Experience", "New York Experience" and "Washington Experience."

[45] See *John Doe v. One America Productions, Inc.* 2006 CA Sup. Ct. Pleadings 91723; 2006 CA Sup. Ct, which is described both above in the introduction and below. .

filmed artwork.[46] Even though the media's use of anti-SLAPP as protection was not likely contemplated by the state legislature, the media have not been deterred from serving their interests with this law. Some Supreme Court cases have developed protections for the press which further support the media's argument that anti-SLAPP statutes ought to be applied to them.

III. CONSTITUTIONAL REFERENCE: ANALYSIS OF SUPREME COURT PROTECTION OF THE MEDIA'S FIRST AMENDMENT RIGHTS

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the *freedom of speech*, or of *the press*; or the right of the people peaceably to assemble, and to *petition* the government for a redress of grievances.[47]

The language of the First Amendment expressly states the "freedom . . .of *the press*" as one of the essential rights protected. Although it does not state specifically the limitations imposed on "the press," it also does not expressly grant the press an unlimited license to publish false or defamatory information or information that is not of public concern. It is important to point out that freedom of the press acts to support the purpose of anti-SLAPP statutes – to freely "petition the government." When understood this way, the best way to freely "petition the government" effectively and then inform the general public of certain issues is by using print or broadcast media. However, while the media are greatly protected due to the First Amendment, there are a few limitations, as illustrated below.

In one of the earliest and most significant cases defining media protections, *New York Times Co v. Sullivan*, the Supreme Court found that the party who brings a lawsuit against the press must prove the press showed "actual malice." Although in this case the plaintiff was a public official rather than a private person, in a later case, *Gertz v. Robert Welch, Inc.*, the Supreme Court addressed private individuals.[48] In *Gertz*, the Supreme Court differentiated between private and public individuals; it found that states could determine their own standards of liability for media companies that reported defamatory information about private people.[49] Nevertheless, if the matter is of public concern,

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[46] *Id.*

[47] *United States Constitution*, http://www.law.cornell.edu/constitution/constitution.billofrights.html#amendmenti, (last visited Dec. 18, 2008).

[48] *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964).

[49] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (1974).

plaintiffs who are generally private individuals still have to show actual malice in order to bring suit against media defendants.[50]

As these two cases suggest, the Supreme Court has developed case law protection for the media, supporting the idea that the media should be protected from lawsuits in most instances. However, not all states that have created anti-SLAPP legislation have drafted anti-SLAPP laws broad enough to allow protections for the media. After all, the language of a statute is the determinative factor, so anti-SLAPP statutes should therefore be written broadly enough to include the media under its protected class in order to be consistent with First Amendment principles and jurisprudence.

IV. THREE CATEGORIES OF PROTECTED ACTIVITY UNDER THE ANTI-SLAPP LAW

Many states have drafted and interpreted their anti-SLAPP statutes differently, varying on the degree of protected activity. The statutes can be separated into three categories: narrow, moderate and broad. Some states, such as California, have drafted broad anti-SLAPP laws clearly allowing for media protection, while other states, such as New York, have drafted their statutes narrowly, limiting the protected activity to a specific class of cases. There is also a hybrid category consisting of moderately drafted statutes allowing protection for communications explicitly connected to government processes or used to petition the government.[51] Although they are considered to be in the media's best interest, broad statutes are still flawed because they can cut too far and chill free speech when the media is allowed to abuse the anti-SLAPP statute. This will be explored below in a California case involving Britney Spears. After reviewing these three classes of anti-SLAPP protection and their flaws, I propose a better and more reasonably tailored anti-SLAPP statute, one that protects the media while simultaneously protecting against media abuse.

A. *Narrow Anti-SLAPP Legislation*

As stated above, narrow anti-SLAPP legislation is the most limiting because it does not allow any protection for the media. State legislatures have narrowed the focus of anti-SLAPP laws by limiting the definition of SLAPP suits. Some states have narrowed the description

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[50] *Id.*

[51] See Wash. Rev. Code § 4.24.510. The Washington statute, like similar other moderate states' statutes define their protected activity to include only information reported to the government.

of SLAPP suits to cases where the plaintiff is a "public applicant or permittee" while some states have narrowed the scope of SLAPP suits to situations involving "leasing, licensing, permits and zoning".[52] While other states have gone even further, restricting the definition of the protected activity solely to testimony given to a government unit "in connection with a government proceeding", thereby insisting that the government be somehow involved.[53]

Because these states have narrowed their definition of protected activity to solely specific instances that do not expressly allow for media usage, these states narrow statutes are too limiting. After all, the first amendment even specifically called to "freedom of the press."[54]

Although a narrowly-tailored statute may protect most *direct* citizen communications with government officials, it does not do much to prevent SLAPP suits that do not concern government officials' communications (i.e. suits filed to silence the media), thus it is too limiting.

B. *Moderate Anti-SLAPP Legislation*

Moderate states' anti-SLAPP statutes are arguably a little better in considering the media defendant's usage – they are not as limiting in only covering direct activity with the government, but these statutes expand their definition of protected activity to cover not only statements (made to government bodies), but also "*communications* regarding a matter reasonably of concern to the governmental entity" and/or "made in connection with any issue under consideration or review by a governmental body."[55] Expressly including "communications" in the definition of protected activity allows for more than statements made directly to officials, covering a broader spectrum of exchanges than those solely directed at the government.

Unlike the narrow states, some of the moderate states have encountered media defendants attempting to employ anti-SLAPP laws as a defense. Thus moderate states statutes are arguably better than nar-

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[52] *DEL. CODE ANN. Tit. 10 § 8136(a) (1)-(2).* See also NEB. REV. STAT. §§ 25-21, 242(1) and *N.Y. CIV. RIGHTS LAW §§ 70-a (1)*, 76-a (a) (1) (a)-(b). *Supra* note 21.

[53] HAW. REV. STAT. § 634F-1; MO. REV. STAT. § 537.528(1). The Hawaiian anti-SLAPP statute's protected activity is defined as "any oral or written testimony submitted or provided to a governmental body during the course of a governmental proceeding."

[54] *United States Constitution*, http://www.law.cornell.edu/constitution/constitution.billofrights.html#amendmenti (last visited Dec. 18, 2008).

[55] *NEV. REV. STAT. § 41.637,* which states that "communication in furtherance of the right to petition" is "communication that is aimed at procuring any governmental or electoral action. . .reasonably of concern to the respective governmental entity, or written or oral statement made in direct connection with an issue under consideration by a legislative, executive, or judicial body, or any other official authorized by law, which is truthful or is made without knowledge of falsehood."

row statutes in that they do allow for potential usage by the media, however the defined protected activity suggest that it has to involve the government in some aspect i.e. the media reporting on government misconduct. Thus the moderate state's statute does not protect non-governmental issues that are of public concern that also may be of interest, essentially encouraging the media to only report on governmental related activity, which is arguably too limiting when considering the first amendment and certain Supreme Court cases addressing the media.

C. *Broad Anti-SLAPP Legislation*

Although moderate states' statutes are better than narrow states' statutes since they at least account for the media defendant (somewhat), they are not the best statute for the media defendant because they still pose limitations on the media concerning activity that should otherwise be protected. Broad states' statutes are better than moderate states' statutes since they have gone even further to protect the media defendant by not limiting the definition of protected activity to a specific class of persons or instances concerning the government. The states in this category have expanded the anti-SLAPP statute's protective scope to "any conduct" done during the act of free speech or "in connection with a public issue or an issue of public interest".[56]

Of all of the states that have broad anti-SLAPP legislation, California is arguably the one that allows the broadest First Amendment protections for the media defendant.[57] Because this paper aims to promote media usage of the anti-SLAPP statute, California's statute and its case law concerning the media defendant is further explored below. The media defendant has used California's anti-SLAPP law protections much too often for this paper to examine each case, thus this paper will highlight a few recent anti-SLAPP cases – one case that shows some media abuse of the anti-SLAPP statute and two cases that have differing outcomes while still promoting the media's usage of the anti-SLAPP statute.

The first case, *Britney Spears v. US Weekly, LLC*, (US Weekly) is a problematic case because it displays the media's abuse of the anti-SLAPP statute.[58] In this case, Britney Spears sued *US Weekly* for libel and defamation, accusing the magazine of falsely reporting that her and

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[56] *CAL. CIV. PROC. CODE § 425.16(e); ARK. CODE ANN § 16-63-503(1)* (2006).

[57] *CAL. CIV. PROC. CODE § 425.17 and 425.18.* This statute introduced a "strict burden of proof standard" to help fix the potential abuse of California's anti-SLAPP law.

[58] *Britney Spears Libel Suit: No Sex Tape*, http://cbs5.com/entertainment/Britney.Spears.Kevin.2.261217.html (last visited Jan. 18, 2009).

her husband (at the time), Kevin Federline, had made a sex tape that contained "raunchy footage."[59] *US Weekly* responded with the anti-SLAPP statute, which led to the California court judge's dismissal of the suit.[60] Essentially because Britney Spears is a public figure (a famous singer and performer) who, according to the judge, "has publicly portrayed herself in a sexual way," and who "plainly discusses her active sex life," the judge ruled this case in *US Weekly*'s favor; in the judge's opinion, the nature of Spears' acts has made her ultimately undefamable.[61] This case's ruling arguably goes outside the scope of what the anti-SLAPP statute was initially aimed to protect. Even though California's anti-SLAPP statute states that it protects "any" conduct in the act of free speech. . . "in connection with a public issue or in an issue of public interest," the anti-SLAPP statute was not intended to protect any instances concerning malice or intentional embarrassment – after all, the anti-SLAPP statute was intended to protect suits that were brought out of revenge or malice and/or with the intent to quiet petitioners from informing the public about alleged truths. Additionally, as mentioned, the anti-SLAPP statute was originally used for protecting individual citizens from abuse from large conglomerates and in this case the anti-SLAPP statute is being used to do the opposite – protect the large corporation *US Weekly*, LLC from Britney Spears, an individual citizen. Furthermore, by allowing the use of the anti-SLAPP statue in this case prevents the plaintiff from proving any malicious intent. Although it is urged that individual citizens should not solely be allowed to use anti-SLAPP protections, and the media too should be protected, this case illustrates a caveat for the kind of media usage that should not be allowed. Large media companies like *US Weekly's* magazine, which is known for "publishing stories based on public curiosity rather than political debate" should either not be protected by the anti-SLAPP statute, or should have to do an additional step in the anti-SLAPP process i.e. displaying its evidence of truth in reporting.[62] In this way, individual citizens, whether famous (Britney Spears) or not (Kevin Federline – before Britney and he started dating), will not be

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[59] *Id.*

[60] *Court Tosses Britney Spears Sex Tape Suit*, http://www.onpointnews.com/NEWS/court-tosses-britney-spears-sex-tape-suit.html (last visited Jan. 18, 2009).

[61] *Id.*

[62] *The True Ramifications of US Weekly's use of Anti-SLAPP against Britney Spears Defamation Suit: Are Relational Agreements Doomed?*, http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=amanda_searle, 2-3, (last visited Jan. 18, 2009). This article discusses the Britney Spears suit against US Weekly and argues that tabloids should not be protected by the anti-SLAPP statute because it ruins the mutually beneficial relationship between celebrities and these magazine companies, thereby infringing on celebrities complete right to privacy.

prevented from living out their daily lives out of fear from false reporting.[63] Although this case concerned a celebrity and a corporation rather than a no-named individual, it is important that the anti-SLAPP statute protect *all* individual citizens from any type of media abuse.

In a more understanding case of the media's usage of the anti-SLAPP statute, *John Doe v. One America Productions*, concerns the producers of the film *Borat* and two fraternity brothers who were filmed in the movie stating racist and sexist views and claim they had not given permission to the film's producers to air their views.[64] Another case, *Dyer v. Childress*, concerns the writers and producers of the film *Reality Bites* where the plaintiff, a childhood friend of the writer, claims both defamation and invasion of privacy for the writer naming a character after him and thus ruining the plaintiff's image with the portrayal of the character as a "rebellious slacker."[65]

In both films, both defendants are being accused of portraying the plaintiff in a way that is invasive of his rights to privacy. However, one case, finds for the defendant, while the other case, finds for the plaintiff. The question is why? Does this mean that the media should not be able to use the anti-SLAPP statute as a defense? The answer to the first question, why is there a difference in outcome – like every attorney's commonly given answer – is because it *depends* on the specific circumstances concerning the differing facts. The answer to the second question – does this mean that the media should not be able to use the anti-SLAPP statute – is NO, this absolutely does not mean that the media should not be allowed to use the statute. In fact, it rather means the opposite, and simply highlights certain circumstances where the media's usage is inappropriate or non-persuasive in light of the purpose behind anti-SLAPP legislation.

In *John Doe v. One America Productions*, the media defendants invoked the anti-SLAPP law as a defense because they claimed that they had a first amendment right to show the fraternity brothers' views since their views contributed to a portrayal of "American views and attitudes," which is an issue of public interest.[66] Essentially, the movie

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[63] *Id* at 2-4.

[64] *John Doe v. One America Productions*, Inc. 2006 CA Sup. Ct. Pleadings 91723; 2006 CA Sup. Ct. Pleadings LEXIS 984, at *5, (2006).

[65] *Dyer v. Childress*, 147 Cal. App. 4th 1273, 55 Cal. Rptr. 3d 544, 2007 Cal. App. LEXIS 260 (Cal. App. 2d Dist., 2007); *supra* note 18.

[66] Judge to Borat: "High Five!", http://www.manatt.com/news.aspx?id=4554 (last visited Jan. 18, 2009); *supra* note 12. This article states Borat creator Sacha Cohen's reasoning for using the anti-SLAPP statute as the purpose of his film was to create a "documentary about American culture" where "in the course of his travels, Borat encounters some enlightened

was a commentary on the variety of issues presented in the film and the fraternity brothers' comments contributed to that commentary.

However, in *Dyer v. Childress*, the court determined that not all speech in a movie is of public interest and therefore entitled to protection under statute.[67] The media defendants in *Dyer*, trying to apply similar reasoning as the *Borat* decision, relying on the fact that "Borat" addressed issues such as racism, sexism, touting here that their film was a commentary as well; a sarcastic portrayal of issues facing generation X. Essentially, the court held that there was not a matter of public interest in defendant's portrayal of the plaintiff as a "slacker." After all, the plaintiff was not a public persona, nor was he commenting on any "public issue or issue of public interest."

Although the courts in *Doe* and *Dyer* reached different conclusions, the decisions can be reconciled.[68] Neither courts in *Dyer* felt that portraying a particular character as a slacker was a "public issue" that warranted free speech protection under California's statute. In contrast, a court could, and in fact did, conclude that the message communicated by the *Doe/Borat* plaintiffs-replete with expressions of sexism and racism-did shed some light on significant issues of public interest. More importantly, both cases demonstrate that anti-SLAPP protection can be a powerful tool for studio litigators. Proper use of the statute at the outset of litigation provides a summary procedure to defeat an entire lawsuit.

As the differences in these two case holdings displays, the media defendant's usage of the anti-SLAPP statute can and should be possible, while also preventing media abuse of the statute. As a rule, the media defendant's usage is pertinent to advancing citizen participation in government since it protects the media's ability to inform the public and allow the public to participate in that information dissemination. So why not solely have a moderate statute since it allows for media protection concerning the government? The answer is because there are other important reports that that the media should be protected in making that does not concern the government i.e. truthful issues concerning people's viewpoints similar to *Borat*.

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citizens who gently correct his bad manners and atavistic worldview" while others "reveal themselves to share his prejudices."

[67] Professor David Ginsburg, Entertainment Law 305 *Lecture*, University of California Los Angeles School of Law, (Spring 2008). During this law course, several topics under Entertainment law were surveyed including SLAPP & anti-SLAPP. In particular, both the Borat and Dyer cases were discussed in opposition to each other where Professor Ginsburg highlighted the differences as a way to shed light on the actual legislature's intent.

[68] *Id.*

As illustrated in this paper, the anti-SLAPP main statute's purpose is to encourage free speech and "public participation in government activities."[69] Because media protection is pertinent to promoting free speech and public participation in "issues of public interest," there needs to be a uniform federal anti-SLAPP law. Although, it is noteworthy that 26 states and one United States territory have adopted anti-SLAPP legislation, the states vary on their degree of protected activity, causing some states (i.e. states applying narrowly tailored anti-SLAPP statutes) to not expressly promote or allow usage by the media defendant. The states that hold broad anti-SLAPP provisions, like California, are the main states encouraging and allowing expansive media usage of the anti-SLAPP statute. Although, California's broad anti-SLAPP statute is very considerate of the media defendant, a statute too broad could possibly be detrimental to getting a federal anti-SLAPP law or encouraging the remaining states to adopt anti-SLAPP legislation. Understandably some states do not want to give the media protection since the media is not helpless; some states are fearful of the media becoming too powerful and intrusive. Thus a uniform anti-SLAPP law has to prevent media abuse, which California's statute has failed to fully do (hence the *US Weekly* decision), while also preventing any protection of the media performing any illegal conduct to acquire their information gathering, like in *Lieberman v. KCOP.*

In this media case decision; California Court of Appeals denied the media company KCOP's motion to dismiss based on California's anti-SLAPP law since the media violated the California Penal Code, which prohibits electronic eavesdropping. While gaining information to broadcast a news segment on doctors that incorrectly prescribed medicine, television reporters deceptively pretended to be patients and covertly tape-recorded the plaintiff, Dr. Lieberman, giving medical advice.[70] The court was going to allow usage of the anti-SLAPP statute, until Lieberman showed how the secret recording of him, violated section 632 of the California Penal Code.[71] If not for this discovery, the media would have been allowed protection although they "falsely" pretended to be patients.[72] In order to prevent media abuse of the anti-SLAPP statute, cases like the possible alternate outcome of *Lieberman* should be expressly prevented in the statute.

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[69] Cal. Code Civ. Proc. § 425.16(a).

[70] *Lieberman v. KCOP Television, Inc.*, 1 Cal.Rptr. 3d 536, 539 (Ct. App. 2003). This case displays the broad application of the California statute, and thus suggests for a more limiting statute – one that does not need other statutes to prevent media abuse.

[71] *Id.*

[72] *Id.*

By blending the best aspects of the California anti-SLAPP statute with some limiting language, in light of the narrow and moderate states' concerns of a too powerful and intrusive media, it is possible to compose a definition of protected activity and burden of proof that best serve the interests of real citizen participation in government, while still preventing media abuse. Below is a possible model statute that the legislation should adopt uniformly.

V. PROTECTION OF TRUE CITIZEN PARTICIPATION: THE MEDIA DEFENDANT AND THE INDIVIDUAL CITIZEN

To fully protect citizen participation in the government, the anti-SLAPP statute must not only protect individual citizens, but must protect the media. As suggested, a possible problem with media protection could be the potential for media abuse. However, provided that the model anti-SLAPP statute prevents media abuse with some limiting language, the media should be uniformly and expressly protected in the statute. Keeping in line with the Supreme Court protections of the media, the model statute should allow protection for only true information (or information that can be proven to be true) in media printing or airing to be publicized thereby preventing false reporting done by tabloids i.e. *US Weekly*. In fact, the statute should expressly state that if the media is found to use the anti-SLAPP statute to protect it while knowingly reporting false or solely speculated information with no hard evidence, the media should have to cover the plaintiff's costs, thereby ensuring legitimate usage of anti-SLAPP. In this way, media companies like *US Weekly* will not use the anti-SLAPP statute unless they have concrete support for their reports, which is in line with the first amendment protections – to be able to speak your mind and write what you want without invading another person's constitutional rights, unless there is hard evidence supporting your statements made.[73]In addition, information that is achieved surreptitiously should not always be covered under the protected activity – there should be a condition requiring a great public need for the information i.e. prevention of death. In this way, a feared chilling effect on free speech will be less likely due to the lack of condoning media coverage done secretly. Furthermore, the protected activity should also include a statutory provision encouraging a somewhat broad interpretation of the statute since it will be expressly limiting, wording the statute in a way that only covers lawful activity and includes only issues that are a public concern, where "pub-

[73] *United States Constitution*, http://www.law.cornell.edu/constitution/constitution.billofrights.html#amendmenti - (last visited Dec. 18, 2008). *Supra* note 51, supra note 52.

lic concern" is defined to revolve around information that has the potential to effect the public at large or the information is a necessity. Thus information of a sex tape done by a husband and wife i.e. *US Weekly*, whether public figures or not, would not be protected because that information does not affect the public at large and therefore is not a *necessity*.

Because California allows for media protection, a model anti-SLAPP statute would incorporate the best aspects of California's definition of protected activity while also including some limiting language from the other states' statutes. Thus, "protected activity" should expressly include the media. For instance, consider the following:

> any statement (written or oral) made by the media and any lawful conduct done by the media to inform the public of any issues of public concern; any information stated or written that is a necessity for the public and/or will effect the public at large; any information stated towards or concerning a government official or any governmental proceeding, or any information stated (or written) to encourage public participation in pertinent issues.[74]

Additionally there are some procedural changes that should be made to the anti-SLAPP statute to prevent media abuse. Because the media is arguably wealthier than any individual citizen, the media should cover their own court costs in addition to the individual plaintiff's when found to use the anti-SLAPP statute illegitimately. After all, it is all about legitimate media reporting – legitimate media reporting should be allowed and encouraged. This can be achieved by creating a strict burden of proof standard, which most states have (although *all* states need this), compelling all parties to show evidence proving the legitimacy of their case before a court decides to strike a claim, thereby balancing the petitioning rights and preventing any unfair intrusions on solely one party's rights.[75]

VI. CONCLUSION

In light of the recent election where the media played a large role in informing the public of today's issues, it is clear that in order to really protect citizen participation in government; the anti-SLAPP statute must include language protecting the media. After all the media in-

[74] This proposed definition is based on some of the language of the California anti-SLAPP statute, while including some limiting language from the moderate state's statute, Massachusetts' statute.

[75] *CAL. CIV. PROC. CODE § 425.17.* This statute introduced a "strict burden of proof standard" to help fix the potential abuse of California's anti-SLAPP law and "balance [both parties] the petitioning rights." See *California Anti-SLAPP Project*: http://www.casp.net/ (last visited Jan. 18, 2009).

forms the public of issues of public concern, thereby allowing citizen participation. Although some states (i.e. California) allow for media protection, it is pertinent that all states allow for media usage since media is a national forum, not state-specific. Even though the media is not an individual citizen, protection is still key for reasons stated throughout this paper.

Because California's statute is too broad and ultimately allows for some media abuse, a tailoring of that statute to allow for only legitimate media reporting is necessary to encourage a uniform federal anti-SLAPP statute – one that does not give more power to an already powerful entity other than the power stated in the constitution and supported by the Supreme Court's interpretation. Protection of the media does not mean allowing the media to be further intrusive – language limiting the use of anti-SLAPP law to conduct and statements truly directed at advancing government action concerning issues of public concern, is key. By creating a definition of protected activity that expressly includes not only individuals but the media, while limiting potential media abuse i.e. allowing protection for only true, lawful and legitimately achieved information, the statute truly carries out its purpose – to protect "citizen participation in government."[76] In effect, focusing on legitimate forms of media speech, will not only further promote citizen participation in government activity, but will prohibit protection of any illicit activity done by the media, which is needed in today's society – a society that encourages a democratic process which can only be achieved through informing the public. Informing the public is what the media does – locally, nationally, and worldwide.

[76] Cal. Code Civ. Proc. § 425.16(a), *supra* note 4.