Does fear of libel lawsuits influence what gets published in medical journals? We suggest it may, especially when the conclusions run counter to corporate interests.

A research team headed by Sargent probed children’s responses to televised fast-food ads. The study tested Children’s Advertising Review Unit (CARU) advertising self-regulation guidelines, in which the Better Business Bureau “evaluates child-directed advertising and promotional material in all media to advance truthfulness, accuracy and consistency with its Self-Regulatory Program for Children’s Advertising.” The study examined children’s responses to television ads from McDonald’s and Burger King, companies responsible for 99% of the child-directed fast-food advertising on television in the United States at that time. It tested whether children’s ads focused the child’s attention primarily on the product and made the premium message clearly secondary, as CARU guidelines on deception said they should.

To test this hypothesis for each company, the investigators randomly selected 1 adult and 1 children’s ad from 2010–2011 national television ads (n = 107) for children ages 3 to 7 years to watch. None of the adult ads and almost all of the children’s ads contained a premium message, typically showing the current toy giveaway. After each viewing, the children were asked, “What did you see?” Most (~70%) reported the adult ad was about food. However, fewer than half reported the children’s ad was about food. For children’s ads alone and for both restaurants, recall frequency for food was not significantly different from premiums/tie-ins. The investigators concluded that the companies had failed to comply with CARU’s self-regulation requirements that they emphasize food over premiums.

The manuscript was reviewed at Pediatrics and was being considered for publication. The process came to a halt, however, when the editor indicated that the publisher, The American Academy of Pediatrics, recommended removal of company names from the manuscript. The authors were unwilling to remove the names for reasons indicated later in this article and withdrew the manuscript. The Pediatrics editor helpfully solicited a written statement of concerns from the publisher, which stated, “In the event that a defamation claim is brought as a result of the publication of this article, the publishing company could be named as defendants. Based on these findings and advice from counsel, we recommend the article not be published.” In other words, the article was not published.
rejected on the possibility of a
defamation claim, a standard that, if
widely adopted by journal publishers,
would have a chilling effect on
science and negative implications for
public health.

WHAT IS DEFAMATION?
Legally, a defamatory statement is
one that is untrue and damages
a person’s (including a corporate
person’s) reputation. Court decisions
in the United States state that
scientific papers are not defamatory
when the “author draws conclusions
from non-fraudulent data, based on
accurate descriptions of the data and
methodology underlying those
collusions.” According to
Underwager v Salt, “scientific
controversies must be settled by the
methods of science rather than by the
methods of litigation. More papers,
more discussion, better data, and
more satisfactory models—not larger
awards of damages—mark the path
towards superior understanding of
the world around us.” The UK Court
of Appeal recently adopted similar
logic in dismissing a defamation
lawsuit relating to scientific
discourse, citing the passage from
Underwager v Salt in support.6

In short, as the law currently stands,
if scientific work is scientifically
sound, it is not defamatory.

Because the article in question is
scientifically sound, as the authors’
conclusion that the companies
violated CARU self-regulation
practices is supported by credible
data, there is no reasonable basis to
believe it is defamatory. However, the
publisher’s concern was not that the
study was defamatory, but that there
was a possibility one of the named
companies might launch a defamation
suit.

By that standard, any article that
reaches negative conclusions about
a company’s practices or products
risks rejection, as it is company
practice today to strategically
threaten libel suits to ward off
legitimate criticism. Such lawsuits,
now so prevalent they have their own
name, Strategic Law Suits Against
Public Participation (SLAPP), are
most often based on defamation law.
Companies initiate baseless SLAPPs
to limit free speech that criticizes
their practices. They are confident
their targets, fearful of the costs and
trouble of litigation, will back down
or settle.7 Publishers provide good
targets because the cost of defending
against SLAPPs draws on their limited
resources. But rejecting publications
on that basis creates “libel chill,”
limiting scientific discourse on
corporate practices and products,
effectively immunizing corporations
from scientific scrutiny.

WHY IS IT IMPORTANT TO NAME
NAMES?
Corporate products (tobacco, alcohol,
energy-dense foods, cars, and guns)
are responsible for most of the almost
1 million preventable deaths that
occur in the United States each year.8
Studies about how corporate
practices and products contribute to
morbidity and mortality, through
marketing of tobacco, alcohol, and
food to children, exposure to toxins
in consumer products and the
environment, or misuse of potentially
dangerous products, such as guns,
cars and drugs, aim to influence
corporate practices through more
robust government regulation.
Such research necessarily requires
the naming of names. From a
scientific standpoint, naming
names ensures specificity, avoiding
ergovergeneralization to companies
that do not engage in the corporate
practice being studied. For example, if
we did not name McDonald’s and
Burger King in the article in question,
readers could have taken the results
to generalize to all major fast-food
companies, when only 2 were
advertising to children on television
at that time. It is also important to
examine the potential impact on
public health. Given the potential
impact that the 2 largest fast-food
chains could have on childhood
obesity, naming names is justified
on the basis of the sheer number
of children who eat energy-dense
foods there. Finally, the naming of
names guides regulatory agencies
with regard to what ads require
scrutiny. Thus, rejecting publication
of company names in studies
critical of their practices is not
only scientifically unsound, but it
deprives practitioners, governments,
and the public of essential health
information.

LIBEL CHILL DOESN’T HAVE TO HAPPEN
Despite the possibility of corporate
SLAPP tactics, scientific publishers
should know that the law is on
their side: the side of science. In
addition to the case law described
previously, which effectively shields
sound scientific work from
defamation liability, legislatures are
acting to protect free speech from
SLAPPs. Several states (including
Illinois, where the American Academy
of Pediatrics is located), along with
a number of Canadian provinces
and the UK Parliament, have passed
laws permitting SLAPP targets to
counter with claims for dismissal.
Congressman Steve Cohen (D-TN) is
currently championing a federal anti-
SLAPP law that deserves the active
support of all scientific publishers.7

Because SLAPPs rarely go to trial, and
journals are prone to self-censor out
of fear of SLAPPs, it is impossible to
know how large the libel chill
problem is; that is a topic in need of
further investigation. In the
meanwhile, not all journal publishers
take the same approach Pediatrics
did. Bernhardt et al’s article2 was
accepted for publication by PLOS One
without any attempt to influence the
naming of the companies involved,
and with encouragement to publish
video material showing the children
responding to the companies’
advertisements.
ASK THE RIGHT QUESTION

To avoid libel chill, publishers of scientific journals should ask the right question when considering whether an article names company names. The wrong question is, “Might publication attract a corporate defamation lawsuit?” The right question, which encompasses publishers’ legitimate concerns about defamation, is, “Can the piece reasonably be construed as defamatory?” Only an affirmative answer to that question (which, by implication, also indicates scientific deficiencies) should be grounds for rejecting an article.

Scientific publishers should be emboldened by defamation law’s hands-off approach to legitimate scientific discourse, along with continuing state and federal initiatives that aim to curb strategically cultivated fear of defamation liability. Modern corporations go to great lengths to protect their free speech rights to market and advertise their products; medical publishers should do the same for research that scrutinizes the ill effects of those products on human health.

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The online version of this article, along with updated information and services, is located on the World Wide Web at:
/content/135/3/403.full.html