

Medical Journals and Free Speech

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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."¹ 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.² 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.³

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

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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 conclusions."⁴ According to *Underwager v Salter*, "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."⁵ The UK Court of Appeal recently adopted similar logic in dismissing a defamation lawsuit relating to scientific discourse, citing the passage from *Underwager v Salter* 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 overgeneralization 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 meantime, 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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