

Date Published: May 2022

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Recommended Citation

Chavarria, J., Flores, J., Mostafa, S., & Riedy, M. (2022). Who is 'SLAPPING' Whom?. *Mountain Plains Journal of Business and Technology*, 23(1). Retrieved from <https://openspaces.unk.edu/mpjbt/vol23/iss1/1>

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WHO IS ‘SLAPPING’ WHOM?¹

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ABSTRACT

A majority of the states and the District of Columbia have enacted “anti-SLAPP” statutes, which set forth a procedure for obtaining an early dismissal of a “strategic lawsuit against public participation,” or a “SLAPP,” as labeled by George W. Pring and Penelope Canan. These types of cases, often alleging defamation or a similar tort, should be discouraged, according to the anti-SLAPP advocates, because the true intent of the plaintiff is to “chill” speech rather than obtain compensation. The paradigm of a SLAPP is a lawsuit filed by a large, well-funded corporation against an “ordinary citizen” who has spoken out in some public forum against the interests of the business. We conducted an empirical study to determine whether this “David v Goliath” scenario holds, or to answer the question: Who is “SLAPPING” whom? Using text mining techniques, we determined that the cases do not conform to the SLAPP model.

Keywords: Strategic Lawsuits Against Public Participation; Anti-SLAPP; Text Mining

INTRODUCTION

A shadowy legal menace was dragged into the light, studied, and enduringly designated a “Strategic Lawsuit Against Public Participation” by George W. Pring and Penelope Canan in the late 1980’s and 90’s (Pring and Canan 1991; Pring 1989; Canan and Pring 1988). A “SLAPP” is a lawsuit or claim filed by a party with the primary aim of stifling political debate (Pring and Canan 1991). The intent to chill speech is “camouflaged” by the assertion of an ostensibly valid claim such as defamation, one or more of various business torts (*e.g.*, interference with contract), “judicial-administrative” torts (*e.g.*, malicious prosecution) or other alleged wrongdoing. The defendant speaker is saddled with the expense of litigation and, more widely, public discourse is “chilled”(Pring and Canan 1991, 947). Otherwise stated, the costs of defending such suits can deter individuals and entities from exercising their constitutional rights to petition the government and to speak out on public issues.

Legislators responded to the threat. In 1989, Washington enacted the first “Anti-SLAPP” statute.² A majority of the states and the District of Columbia followed suit (Rome 2016, 429, 430). A federal anti-SLAPP was introduced in Congress in 2015.³

¹ Submitted 23 September 2021; Revised 29 January 2022; Accepted 8 April 2022

² WASH. REV. CODE (ARCW) §§ 4.24.500 *et seq.*

³ The SPEAK FREE Act of 2015, H.R. 2304, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/2304/text>.

California was also an early adopter, in 1993, and the California statute, including its expansive definition of protected activity, was used as a model by many states (The Sedgwick Law Firm 2011). Thus, the California statute protects any "act in furtherance of a person's right of petition or free speech" including "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest" ⁴ However, in other states coverage is narrower. In New York, which has one of the narrowest scopes (Law.com 2019), for example, to qualify as a SLAPP the lawsuit must be "materially related" to speech by the defendant concerning the plaintiff's application to a "government body" for "a permit, zoning change, lease, license certificate or other entitlement for use or permission to act." ⁵

Although states' anti-SLAPP statutes vary in this key regard, all establish a type of procedural mechanism specifically for use by the party against whom the lawsuit is filed ⁶ for obtaining an early dismissal of the claim by the court. Generally, the defendant must file an anti-SLAPP motion shortly after the case commences. ⁷ The statutes typically require an expeditious decision from the trial court ⁸ and often mandate a stay of discovery while the court entertains the motion. ⁹ The prevailing party may recoup attorney's fees and costs. ¹⁰ The overall objective is for the party defending against the SLAPP claim to obtain a prompt and relatively low-cost dismissal of the claim.

All state anti-SLAPP procedures require a heightened evidentiary showing from the claimant, relative to the stage of the proceedings. That is, if the defendant files an anti-SLAPP motion and establishes that the claim against it constitutes a SLAPP, as defined by the statute, the burden shifts to the claimant at the outset of the litigation to establish the legitimacy of the claim. Pursuant to California law, for example, if the defendant makes the required showing, the claimant

⁴ Cal. Civ. Proc. Code § 425.16(e).

⁵ N.Y. Civil Rights Law §76-a.

⁶ Our research identified cases in which the plaintiff filed the anti-SLAPP motion against a defendant's counterclaim. In the typical case, however, the motion is filed by the defendant in the lawsuit.

⁷ *E.g.*, Cal. Civ. Proc. Code § 425.16(f) ("The special motion may be filed within 60 days of the service of the complaint"); Vt. Stat. Ann. Tit. 12, § 1041(b)(2016) ("A special motion to strike under this section shall be filed with the court and served on all parties not more than 60 days after the filing of the complaint.").

⁸ *E.g.*, Cal. Civ. Proc. Code § 425.16(f) ("The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after service of the motion"); Mass. Gen. Laws Ann. Ch. 231, § 59H ("The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible."); Vt. Stat. Ann. Tit. 12, § 1041(d) ("The court shall hold a hearing on a special motion to strike not more than 30 days after service of the motion unless good cause exists for an extension.").

⁹ *E.g.*, Cal. Civ. Proc. Code § 425.16(g) ("All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section."); Mass. Gen. Laws Ann. Ch. 231, § 59H ("All discovery proceedings shall be stayed upon the filing of the special motion under this section"); R.I. Gen. Laws Ann. § 9-33-2(b) ("The court shall stay all discovery proceedings in the action upon the filing of the motion"). However, anti-SLAPP statutes also commonly allow for the continuation of limited discovery for good cause. *See, e.g.*, Cal. Civ. Proc. Code § 425.16(g) ("The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision."); Mass. Gen. Laws Ann. Ch. 231, § 59H ("[T]he court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted.").

¹⁰ *E.g.*, Cal. Civ. Proc. Code § 425.16(c)(1) ("[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs."); Ill. Comp. Stat. Ann. 110/25(c) ("The court shall award a moving party who prevails in a motion under this Act reasonable attorney's fees and costs"); Mass. Gen. Laws Ann. Ch. 231, § 59H ("If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees").

must demonstrate a “probability of success on the merits” in order to proceed,¹¹ which standard requires “both legally sufficient and a prima facie showing of facts sufficient to sustain a favorable judgment if the evidence submitted by the plaintiff is given credit.”¹²

As anti-SLAPP jurisprudence matured, critics began to observe significant departures from the noble and relatively uncontroversial objective of these statutes: To prevent unmeritorious cases from chilling constitutionally protected speech. For one, the breadth of many anti-SLAPP statutes -- as originally drafted, amended, or interpreted by the courts -- includes many other types of activities only “tangentially related to free speech and public participation.” (Golden 2015, 426, 430) For example, relying on the expansive language of the California statute, the defendant pharmaceutical company in *Martinez v. Metabolite International, Inc.*¹³ filed an anti-SLAPP motion against claims of product liability and deceptive advertising, arguing that those claims arose from the defendant’s protected commercial speech: Advertising for its products to a public having widespread interest in its dietary supplements. The court denied the motion, but the proceeding came at a significant cost to the plaintiff.

As the number of filed anti-SLAPP motions rose, some members of the bar and the bench complained of the use of anti-SLAPP motions as a delaying tactic. As one California litigant observed: “[A] defendant can file an anti-SLAPP, [then] appeal, and get a one-and-a-half year delay with no consequences. That is grossly out of whack.” (Golden 2015, 454-55).

The Internet was in its infancy when many of the anti-SLAPP statutes were enacted. It is doubtful those legislators could have predicted the outsize role the Internet plays in public discourse today or the great potential for abusive speech in that forum. Cyber-stalkers post rape threats and hurtful lies, often anonymously, against which abuse victims have little recourse but to disappear from the web (Citron and Richards 2017, 1353, 1365). Consumers post false, vicious reviews of business services on popular review websites and the abused business owner has no means to rebut the review online (Roberts 2016, 633, 638). Harmful content posted on the Internet “goes viral,” re-victimizing the target thousands or even millions of times. In short, the Internet “amplifies the harm caused by libelous publications.” (Roth 2016, 741, 751)

A person or business defamed or otherwise injured by speech on the Internet, turning to the courts for redress, faces a daunting series of challenges.

First, the platform on which the speech appears is generally immune from liability. That is, the Communications Decency Act,¹⁴ protects an “Internet service provider” – essentially any platform on which third-party speech is posted – from liability.

Second, if the offending speech was anonymous, the claimant must overcome the “anonymous speaker privilege,” a doctrine derived from First Amendment jurisprudence by the courts (Riedy and Sperduto 2012, 249). This privilege requires the claimant seeking compelled discovery of the identity of her offender to provide evidence beyond the mere allegations of the

¹¹ *Id.*

¹² *Navellier v. Sletten*, 29 Cal.4th 82, 88–89, 124 Cal. Rptr. 2d 530, 52 P.3d 703 (2002).

¹³ 113 Cal. App. 4th 181 (2019)

¹⁴ 47 U.S.C. § 230 (c)(1) (1998).

complaint. Depending on the jurisdiction, the plaintiff must prove a “prima facie” case or even meet the summary judgment standard before discovery has even begun (Riedy and Sperduto 2012, 249).

The final obstacle is the anti-SLAPP motion. That is, if the plaintiff succeeds in determining the defendant’s identity, the defendant can then file an anti-SLAPP motion. For other reasons the anti-SLAPP motion may be denied, of course, but one criterion for dismissal will usually be met: All but a handful of online posts are statements “in a public forum.” (Gerrie 2017, 26)

Perhaps all these obstacles to litigating the merits of the case are justified in the interests of protecting the right to speak. And when by far the largest public forum – the Internet -- is particularly vulnerable to the chilling effect of SLAPP suits because news of the suit can spread, almost instantly, across the globe (Roth 2016, 751), this conclusion may be more compelling than ever.

At bottom, the objective of anti-SLAPP laws should be fairly to balance the competing interests of free speech and the right to seek redress in a court of law (Roth 2016, 750). Arguing that anti-SLAPP statutes and judicial interpretations of those statutes rest on an “outdated empirical basis and incomplete theoretical justification,” one scholar has called for a new empirical analysis of the structure and functioning of anti-SLAPP in order to evaluate whether the balance has been properly struck (Roth 2016, 743). One such empirical analysis is described in this article.

BACKGROUND TO STUDY

Anti-SLAPP statutes protect the rights of petition and free speech. Just as these First Amendment rights extend to business entities and other organizations, as well as individual citizens, the protections of anti-SLAPPs are not limited to individuals.¹⁵

However, the fundamental rationale for anti-SLAPP rests firmly on the objective of preventing the “chilling effect” of an actual or prospective lawsuit. Any speech can be chilled, of course. The expense of litigation is not welcome even to a large corporation with extensive financial reserves, and the pockets of a small, limited liability company may not be very deep. Still, on average, the individual citizen can least afford the cost of defending against the claim and is therefore the most vulnerable to a SLAPP. Further, when a business entity is “speaking” collectively that speech, albeit protected by the First Amendment, is likely in the interests of the financial well-being of the business. The individual citizen, on the other hand, speaking out on a public platform, perhaps for the first time, on a matter of public concern is, arguably, not as likely

¹⁵ *E.g.*, *Henne v. City of Yakima*, 182 Wn. 2d 447, 455 (2015)(“ Thus, the legislature made clear that the purpose of RCW 4.24.525 was to prevent frivolous SLAPP suits from deterring individuals and entities from exercising their constitutional speech rights—that is, their communicative activity.”); *Schoendorf v. U.D. Registry, Inc.*, 97 Cal.App.4th 227, 235, 118 Cal. Rptr. 2d. 31 (2002)(“The Legislature enacted the anti-SLAPP statute to protect defendants, including corporate defendants, from interference with the valid exercise of their constitutional rights, particularly the right of freedom of speech and the right to petition the government for the redress of grievances.”)

to be seeking personal gain. Primarily, then, anti-SLAPP should be protecting the ordinary citizen engaging in a matter of public concern.

This conclusion is certainly supported by the anti-SLAPP rhetoric, which revolves around the “David versus Goliath” scenario (Rome 2016, 430; Roth 2016, 753-54): A large, well-funded corporation sues a citizen of modest means who has spoken out in some public forum against the interests of the business.¹⁶ Thus, for example, in their original study, Pring and Canan noted that most of the defendants in cases they identified as SLAPP’s were “individuals,” (Canan and Pring 1988, 389) “normal, middle-class and blue-collar Americans, many on their first venture into the world of government decision making.” (Pring 1989, 3) Those filing suit were “real estate developers, property owners, police officers, alleged polluters, public utilities, and state or local governments.” (Pring 1989, 3) In response to the Pring and Canan works, legislators worried about “private citizens . . . exercising their constitutional right to speak out against development projects or other matters of concern to them and their communities.”¹⁷ SLAPP suits were characterized in the courts as “generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so.”¹⁸

But it just may be, as at least one scholar has suggested, that the Internet has “upended” the classic David versus Goliath scenario “by giving David a technological edge.” (Roth 2016, 754) David can lodge his complaints about Goliath to a million people with the click of a mouse, and those complaints last forever in the digital world (Roth 2016, 754). In other words, perhaps anti-SLAPP statutes are not being used so much as a shield by the “little guy,” but as a sword to escape responsibility for causing injury, perhaps serious injury to some other individual or entity on the Internet. Another possibility is that anti-SLAPP is being used less by individuals engaged in political debate than by giants of corporate America who have simply added anti-SLAPP to their litigation arsenal. This question – who is “SLAPPING” whom – is addressed in our study.

The analysis described below had as its primary objective to clarify the role of anti-SLAPP thirty years after the enactment of the first of its kind. Specifically, we identified and characterized the anti-SLAPP filer and the target in order to determine whether anti-SLAPPs are being used to protect individual citizens or business interests.

From the perspective of methodology, this study can be classified as exploratory (Singleton and Straits 2010, 107) of the landscape (Branting 2017) of anti-SLAPP research. To the best of our knowledge, not previously research undertaken. The text mining process allowed us to harvest quantitative data from a corpus of case law. Subsequent stages followed an adaptive process guided by a progressively more comprehensive understanding of the anti-SLAPP corpus. These stages are summarized in the following section and detailed in Appendix A.

METHODOLOGY AND RESULTS

To summarize our methodology for addressing the research question: We created a corpus of anti-SLAPP cases to perform information retrieval and text mining on it or, in other words, what

¹⁶ E.g., *Duracraft Corp. v. Holmes*, 427 Mass. 156, 161, 691 N.E. 2d 935, 940 (1998).

¹⁷ *Kobrin v. Gastfriend*, 443 Mass. 327, 336-37, 821 N.E. 2d 60 (2005).

¹⁸ *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 816-17, 33 Cal. Rptr. 2d 446 (App. Ct. 1994).

is known as text analytics (Sharda, Delen, and Turban 2020). (Sharda, Delen, and Turban 2020)By using text analytics, we identified the filer and the target of an anti-SLAPP motion in each case and characterized each as either an individual or a corporation. The complete methodology process is set forth in Appendix A.

In the pre-analysis stage, we collected the documents that belong to the corpus of anti-SLAPP court cases contained in Nexis-Uni. We used the keyword “anti-SLAPP” to search all cases in all state and federal courts with the cut-off date October 30, 2019, identified 6,738 cases, and manually downloaded the documents.

From the entire corpus, cases from California predominated by a wide margin. Of the 6,738 cases, 4,940 cases originated in California federal or state courts (3,739 state and 1,201 federal), representing 73% of the total. This result makes sense, given that California was one of the early adopters of anti-SLAPP legislation, and the state’s statute is quite broad, as discussed above. But the results of the analysis conducted on the entire corpus would clearly be skewed by the California cases, and would, therefore, be largely inapplicable to any of the other jurisdictions having anti-SLAPP statutes. By limiting the analysis to California cases, then, the results would have statistical validity and eliminate the need to attempt to control for inconsistent legal environments, while maintaining a corpus robust enough for valid statistical analysis. Accordingly, a new set of cases focusing only on California was created for analysis.

Subsequent steps, as described in detail in Appendix A, led to additional depuration of the cases. For example, when one case produced multiple published decisions, all had to be eliminated except for the opinion addressing the validity of the anti-SLAPP motion. The final dataset consisted of 3,980 cases, including both state and federal courts, from the state of California.

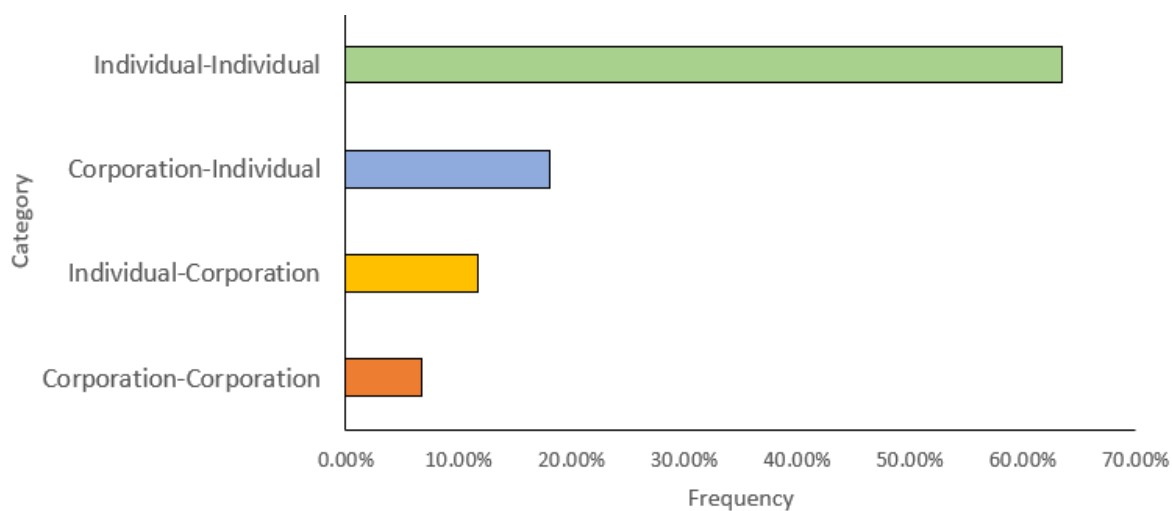
The principal finding from the data and the answer to the central research question is that by far the highest percentage of cases in the corpus were between individuals. As demonstrated in Figure 1, in 63.52% of the cases both the plaintiff and the defendant were one (or more) individuals. Only 18.09% fit the “David versus Goliath” model, or a case in which a corporation sued an individual and the individual wielded the anti-SLAPP shield, and in 11.63% the filer was a corporation and the lawsuit had been filed by an individual. The remainder, 6.76%, were purely corporate disputes. The time series graph (Figure 2) demonstrates that this pattern – individuals using anti-SLAPP against other individuals – was consistent.

Other observations, as evidenced by the time series graph include that, after an initial period of relative quiescence, the use of anti-SLAPP rapidly gained popularity, rising approximately 30% in the period 2001-2002, and 50% between 2002 and 2003. The number of cases continued to climb, then roughly stabilized between 2007 and 2019. During this latter period the number of cases ranged between 211 and 284. The sharp decline in 2019 is artificial because October 30, 2019, was the cut-off date for the search for cases in Nexis-Uni.

The earlier pattern probably reflects a “learning curve” during which practitioners gradually became aware of the new legislation and then, quickly grasping the potency of an anti-

SLAPP motion, regularly deployed it. That the California Supreme Court confirmed the broad reach of the statute in a series of cases it decided in 2002 may well have accelerated this trend.¹⁹

These results depend on the validity of our methodology, of course. One weakness in the methodology insofar as the characterization of the parties as an individual or a corporation is concerned may be the over-inclusion of small businesses or “trusts,” for example, in the “corporate” category. But had it been feasible to design an algorithm to filter for business size, and assign smaller businesses to the “individual” category, the principal conclusion would only have been strengthened. It is also certainly possible that, in some number of cases, the court’s opinion would reveal that a party designed as an individual from the case caption, which was the data source used for party identification, was, instead, an L.L.C. or other business interest. Given the wide margin between the number of “individual versus individual” and any other type of case, however, the overall finding for the cases analyzed seems sound.



	Corporation- Corporation	Individual- Corporation	Corporation- Individual	Individual- Individual	Total
Frequency	269	463	720	2528	3980
Relative Frequency	6.76%	11.63%	18.09%	63.52%	100%

Figure 1. Frequency and relative frequency by type of anti-SLAPP motion from 1994 to 2019* *2019 only includes data until October 30, 2019

¹⁹ Equilon Enterprises, LLC v. Consumer Cause, Inc., 29 Cal. 4th 53, 124 Cal. Rptr. 2d 507 (2002); City of Cotati v. Cashman, 29 Cal. 4th 69, 124 Cal. Rptr. 2d 519 (2002); and Navellier v. Sletten, 29 Cal. 4th 82, 124 Cal. Rptr. 2d 530 (2002).

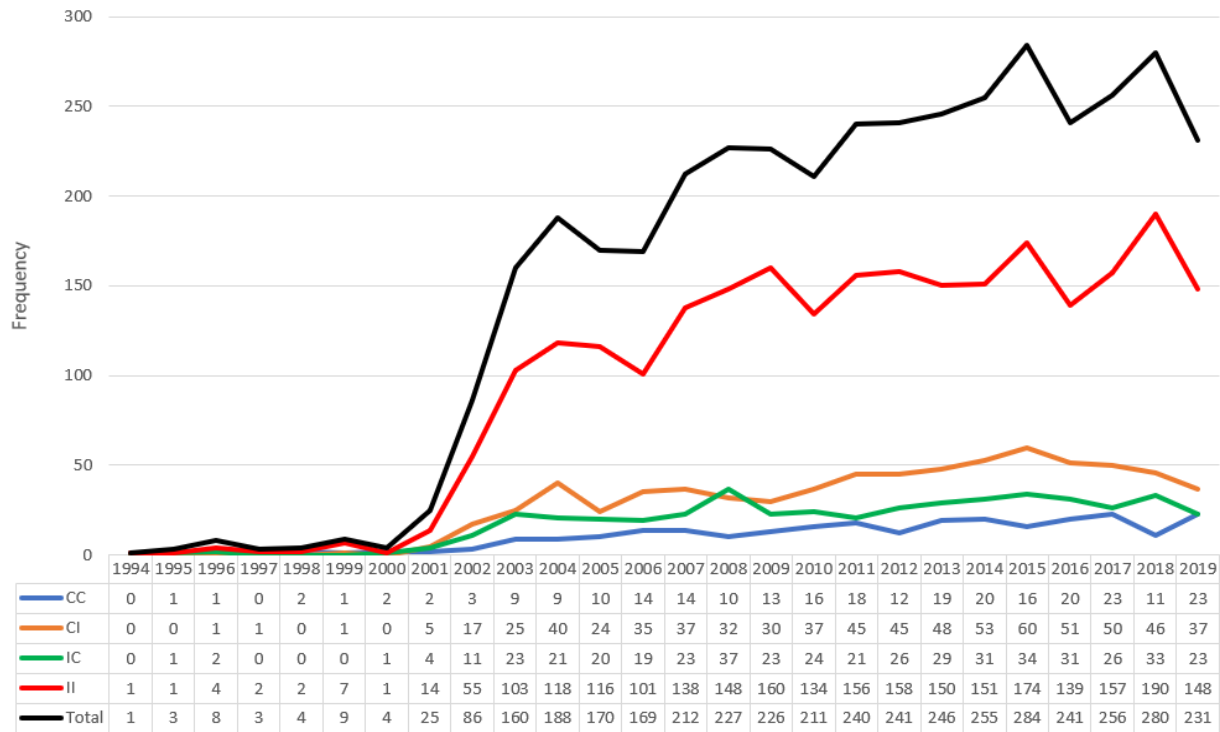


Figure 2. Number of anti-SLAPP motions filed from 1994 to 2019* (CC = Corporation-Corporation, CI = Corporation-Individual, IC = Individual-Corporation, II = Individual-Individual)
 *2019 only includes data until October 30, 2019

CONCLUSION

The conclusive answer to the legal research question addressed is that in California lawsuits – the vast majority of all cases filed in U.S. courts during the review period – the statute is being used primarily to protect individual citizens, but not against powerful corporate interests. Individuals are “SLAPPING” individuals.

Although our study was restricted to California cases only, concerned parties in other states should, perhaps, also take heed, for it seems unlikely that the nature of defamation litigants varies dramatically from state to state. Certainly, our results should be of interest in states in which anti-SLAPP statutes closely resemble California’s in terms of definitions and procedure.

The results of our analysis are not necessarily troubling. Anti-SLAPP statutes are intended to protect the rights of petition and free speech, as noted above, and for this purpose alone whether the alleged infringer of these rights is an individual or a corporation may be largely irrelevant.

Yet, one might question whether the spectre of a “SLAPP” from another individual is as likely to risk “chilling” free speech as is the same threat from a corporation. The latter is presumably easily able to marshal the funds necessary to launch a lawsuit, whereas an individual might be constrained from retaliating. If the risk of chilling speech is substantially less, the countervailing consideration in ensuring individuals have the right to redress in a court of law becomes more salient.

Otherwise stated, the main theme in the battle hymn for adopting anti-SLAPP statutes was to level the playing field between well-funded corporations and individuals. When the players are, instead, two individuals, the field should already be flat. The effect of the anti-SLAPP statutes, then, may be to unfairly tilt the field to the advantage of the speaker and against the allegedly defamed party.

The most sweeping legislative fix for righting this balance, and ensuring that meritorious defamation lawsuits are not summarily dismissed, would be to narrow the scope of anti-SLAPP statutes like California's. That is, perhaps speech "in a public forum in connection with an issue of public interest," which could encompass a Twitter shower, should not be protected by anti-SLAPP provisions. Instead, the anti-SLAPP procedure could be made applicable only to speech directed at a government entity for purposes of affecting state action, for example.

Less radical amendments to the anti-SLAPP statutes might also be considered. For example, many of these statutes allow the defendant to recoup attorneys' fees if the motion is granted. This departure from the general American rule that a party pays its own fees may not be justified at all, particularly given that this cost should be relatively modest because the resolution of the anti-SLAPP motion is expedited. Alternatively, the statute could allow for attorney's fees only if the plaintiff seeks and is granted discovery, and then the motion is granted.

Our methodology confirmed the observations of other scholars and practitioners that text mining in court decisions is hindered by the unstructured representation of the legal text stored in electronic documents. Conventional tools for extracting information from electronic databases of court decisions, such as the parametrized searches available on Lexis Nexis and Westlaw, can quickly generate a corpus of relevant information. To interpret and draw statistically valid conclusions from that information, however, may require different text mining techniques such as the automated process for extracting structured information from a large corpus as was used in this study (Branting 2017; Wyner et al. 2010).

The substance of court decisions is inherently heterogeneous, factually and legally, and complex on many other levels, including the use of distinctive legal vocabulary that has syntactical complexity (Branting 2017, 17), which poses challenges to automated text mining that can, to some extent, be overcome.²⁰ To reach the full potential of text mining, however, including the possibility of using artificial intelligence for legal research and analysis (Surden 2014), a

²⁰ Branting, for example, describes a number of approaches to data mining in court decisions. These include "case oriented approaches," which focus on the "significant characteristics of cases considered as a whole, such as duration, costs, and potential awards or punishments, and probability of success of claims, motions, or other pleadings.(p. 13)" This approach is used to support litigation. Document oriented approaches focus on analysis of individual documents to extract information to identify named entities, perform automatic summarization, or assist in the retrieval of legal documents of interest when completing electronic searches. Corpus oriented approaches focus "on the properties of the entire collection of legal texts, including network structures, temporal sequential characteristics, legal landscapes and content distribution. (p. 16)"

standardized *structure* for electronic case documents may be necessary,²¹ such as Legal XML or Global Justice XML,²² and with this conclusion we concur.

²¹ L. Karl Branting & Margaret Hagan, Big Data, AI, and the Future of Court Management, (National Association for Court Management 2013); Karl Branting, Data-centric and logic-based models for automated legal problem solving, *Artif. Intell Law* (2017) 25:5-27, 17. By way of constructive example, in the healthcare field the application of machine learning techniques was enabled by the standard classification of diseases (ICD-10), which has resulted in advances in knowledge on topics as diverse as the classification of causes of death, clinical patterns of sleep apnea, types of attention deficit hyperactivity disorders (ADHD), and better definitions of psychiatric diseases and improved treatments.

²² <https://web.archive.org/web/20200727001245/https://www.ncsc.org/topics/technology/electronic-filing/resource-guide>

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APPENDIX A

To summarize our methodology for addressing the research question: We created a corpus of anti-SLAPP cases to perform information retrieval and text mining on it or, in other words, what is known as text analytics (Sharda, Delen, and Turban 2020). By using text analytics, we identified the filer and the target of an anti-SLAPP motion in each case and characterized each as either an individual or a corporation. Table 6 shows a schematic of the complete methodology, including a pre-analysis stage and six analytical stages, described below.

As a preparation step, we gathered documents from Nexis-Uni which included the keyword “anti-SLAPP”. We did this manually, since the price provided by the organization to complete a bulk download was too high. Setting the cut-off date to October 30, 2019, we collected 6,738 cases that complied with our criteria.

For stage 1, we did a basic percentage calculation considering the entire corpus, where 4,940 cases came from California federal branch, or from California state courts. Therefore, we considered that this 73.32% of the total number of cases showed us a path to achieve more robust results only working with California cases, while keeping a large portion of cases.

In stage 2, we began testing the capabilities of the text retrieval algorithm, which for this and subsequent stages, was implemented in R programming language, version 3.6. R is a programming language suitable for performing text analytics to generate metadata about a corpus and allow classifications (Feinerer 2008). The main objective of this stage was to find a target text section for the retrieval that would fit a consistent and uniform pattern to enable the program to automatically extract data relevant to the research question from the corpus without the need for human review. We extracted a short segment of the “Opinion” section of the case, as labeled by Nexis-Uni, immediately preceding and following the term “anti-SLAPP” in order to attempt to identify the filer and the target of the anti-SLAPP motion. We ran a pilot by extracting this section from twenty cases, which the human legal expert reviewed. Based on the expert’s evaluation, the conclusion was that we could not consistently rely on text from this segment because there was no uniform pattern that could lead to an automated output for identifying both anti-SLAPP parties. This initial finding is consistent with previous studies focusing on the analysis of legal documents: Due to the heterogeneity of legal documents, the application of text mining analytics is a complex and multi-step process.²³ The constructive finding from this stage was that we realized the algorithm could correctly identify the plaintiff and the defendant from the case caption, a discrete and uniform body of text in all cases.

Building on the findings from stage 2, in stage 3, we performed text retrieval from all California cases and generated an Excel file with three fields: case caption, name of plaintiff(s), and name of defendant(s). We proceeded to select one hundred fifty cases based on a set of unique random numbers, using a true random number generator (Random.org n.d.). This particular random number generator has been used in research domains such as computer science,

²³ E.g., Karl Branting, Data-centric and logic-based models for automated legal problem solving, *Artif. Intell Law* (2017) 25:5-27, 17; Jaromir Savelka, et al., *Sentence boundary detection in adjudicatory decisions in the united states*, *Traitement Automatique Des Langues* (2017) 58:21-5, 2.

psychology, and legal.²⁴ Next, the legal expert reviewed and determined if case captions were identified correctly for all cases. Further, the expert found that the program classified the plaintiff and defendant correctly in 95%²⁵ of the randomly selected cases, and consequently, the researchers turned to address the next step.

In stage 4, we completed two steps. First, in step 4 (a), we characterized the anti-SLAPP named parties as an individual or business interest. Based on the findings in 4(a), the algorithm was refined and in 4(b) we repeated the characterization, with improved results.

For step 4(a), we ran the program on a randomly selected sample of 150 cases and sought to establish the characterization of the named parties as “individual” or “business” interest. In order to automate the characterization, we defined a dictionary of terms to extract from the studied cases. If a party’s name (as extracted from the caption) included any of the following eight text strings it would be classified as a business entity or “C”: Inc, LP, LLP, LLC, Corp, Co, LC or SA. If a party’s name did not include any of these strings it would be classified as an individual or “I.” The R algorithm was adjusted accordingly and applied to the set of selected cases, and the legal expert evaluated the results.

Two problems were identified. First, the characterization as C or I yielded an overall classifier accuracy of 71.7%. The reviewer analyzed the incorrectly characterized observations and was able to identify the main source of this error rate: The initial dictionary of terms was insufficient. Consequently, the text mining program was adjusted to include the additional terms PLLC, Trust, Company, Corporation, and Venture as markers for the characterization “C.” The second problem was the inclusion of “duplicates” in the sample. This was not a data collection problem but, instead, arose from the reporting of multiple decisions in the same case. The term “anti-SLAPP repeatedly appeared because, for example, the court in a subsequent decision referenced the procedural history of the case. But because the name of the plaintiff and defendant, including the presence or lack of a term determining “C” or “I” did not change, the duplicates could just be eliminated. The researchers decided that in the final round of analysis, they would apply a manual procedure that could be implemented with Microsoft Excel string manipulation functions to identify those cases that would lead to duplicate reporting. Consequently, when such duplicate instances were identified, the case with the earliest date was retained in the corpus and the subsequent decisions were deleted.

In stage 4(b), using the same set of randomly-generated cases, an additional data point was added for each case: The identity of the filer and target. In order to automate the identity of the filer, the same difficulty arose as in stage 2: How to identify a consistent amount of text for

²⁴ *E.g.*, Ian Kellar & Charles Abraham, Randomized controlled trial of a brief research-based intervention promoting fruit and vegetable consumption, *British Journal Of Health Psychology* (2005) 10:543-558, 4; Bradley J Huestis, Anatomy of a Random Court-Martial Panel, *ARMY LAW*. (2006) 10:22-32; Paul Biggar, et al., An experimental study of sorting and branch prediction, *12 Journal Of Experimental Algorithmics (JEA)* (2008) 12:1-39.

²⁵ From Ramesh Sharda, et al., *Analytics, Data Science, & Artificial Intelligence* (2020),

$$\text{Overall Classifier Accuracy} = \frac{\sum_{i=1}^n (\text{True Classification})}{\text{Total Number of Cases}}$$

extraction that would be uniform across cases. Seeing no other workable solution, we decided to assume the defendant would be the filer and the plaintiff the target, a reasonable assumption, according to the legal expert. This identification would be entered automatically by the algorithm in the Excel table.

The results of the automatic classification were reviewed by the legal expert. In 115 (76.7%) of the cases the defendant was correctly identified as the filer; in 25 cases (16.7%) the defendant was not the filer and in 10 cases (6.7%) no anti-SLAPP motion had been filed in the case. The legal expert identified the source of both of these types of errors. The incorrect designation of the filer occurred in cases involving either a cross or counter claim. In these cases, the assumption that the defendant would be the filer failed because the original plaintiff, faced with a counter claim constituting a “SLAPP,” would be the filer. Similarly, given a “SLAPP” cross claim, the defendant filing the cross claim would be the target (and the other defendant the filer). This problem could be resolved by eliminating cases including cross or counter claims. The second problem arose in cases in which an anti-SLAPP statute was referenced in regard to a different legal issue. The researchers did not resolve this problem but, given the accuracy could not readily identify a solution to this problem but, given the small number of these cases, the inclusion of these in subsequent analyses did not undermine the validity of the results, as demonstrated below.

In stage 5, we selected a new random set of 150 cases following the procedure explained in stage 4. We applied the algorithm for characterization as “C” or “I” and the added terms “cross” and “counter” to flag cases for deletion from the corpus. All duplicates were also deleted. The resulting corpus contained 109 cases. The results were reviewed by the legal expert.

We performed a chi-square test to measure the distribution of individuals and corporations counted as filers and targets and compare the classification done by the algorithm against the one performed by the legal expert on the same sample of 109 cases. The sample had one degree of freedom and an χ^2 critical value of 3.841 at a significance level of 0.05.

Table 1. Classification of I or C when Target

Type of Filer	AUTO (O)	Human (E)	O-E	(O-E) ²	(O - E) ² /E
I	90	86	4	16	0.186
C	10	23	-4	16	0.696
				$\chi^2 =$	0.882

I = Individual, C = corporation, O = observed, E = Expected

Table 2. Classification of I or C when Filer

Type of Filer	AUTO (O)	Human (E)	O-E	(O-E) ²	(O - E) ² /E
I	86	80	6	36	0.450
C	23	29	-6	36	1.241
				$\chi^2 =$	1.691

I = Individual, C = corporation, O = observed, E = Expected

As shown in Tables 1 and 2, the entity’s classification as the filer or the target of anti-SLAPP motions performed by the algorithm and the human expert are not statistically different since, in both tables, χ^2 is below the critical value.

In addition, we performed a more robust Chi-square test considering both parties combined together.

Table 3. Classification of I or C when Target and Filer considered together

Type of Filer	AUTO (O)	Human (E)	O-E	(O-E) ²	(O - E) ² /E
I	176	166	10	100	0.602
C	42	52	-10	100	1.923
				$\chi^2 =$	2.525

I = Individual, C = corporation, O = observed, E = Expected

This also indicates that the categorization distribution of the program and the legal expert did not differ, since the Chi-square statistic is below of the critical value of 3.841.

To corroborate results, we applied the Cohen’s Kappa inter-raters’ reliability. Cohen’s Kappa is used when comparing the degree to which two raters categorize nominal categories or events in a consistent way.^[1] This is a technique that has been used across multiple disciplines, and “it is the most important and most widely accepted measure of interrater reliability when the outcome of interest is measured on a nominal scale.”^[2] Researchers who apply interrater reliability indicate that values between 0.61 and 0.80 indicate substantial, and between 0.81 and 1.0 indicate almost perfect^[3] agreement between or among raters.^[4] We used IBM SPSS version 24 and calculated the agreement to classify parties as corporations or individuals. Results indicate that Cohen’s Kappa inter-raters’ reliability between the algorithm and the human expert has a value of 0.80 when the party is a filer, and a value of 0.82 when it is the target (Tables 4 and 5). Based on the defined thresholds in interrater reliability literature, we assert that the classification agreement between the algorithm and the human expert is in the border between almost perfect and substantial.

Table 4. Consistency Classifying C or I as Filer

¹ Kevin A Hallgren, Computing inter-rater reliability for observational data: an overview and tutorial, 8 *Tutorials In Quantitative Methods For Psychology* (2012) 8:23-34, 1.

² (p.165), Shuyan Sun, Meta-analysis of Cohen’s kappa, 11 *HEALTH SERVICES AND OUTCOMES RESEARCH METHODOLOGY* (2011).

³ Mary L McHugh, Interrater reliability: the kappa statistic, 22 *Biochemia Medica* (2012) 22:276-282, 3.

⁴ J Richard Landis & Gary G Koch, The measurement of observer agreement for categorical data, *Biometrics* (1977).

	Value	Asymptotic Standard Error	Approximate Significance
Kappa Agreement	0.80	0.07	8.44
Valid cases	109		

Table 5. Consistency Classifying C or I as Target

	Value	Asymptotic Standard Error	Approximate Significance
Kappa Agreement	0.82	0.07	8.66
Valid cases	109		

In stage 6, having corroborated that the algorithm and legal expert consistently agreed on the classification and identification of parties from the one hundred fifty document sample, we proceeded to conduct the automated analysis on the corpus of 4,940 California anti-SLAPP cases. The algorithm produced a metadata file that included fields for case title, target, filer, and classification as individual or corporation. Next, we applied string manipulation functions from Excel and found 1,349 documents referencing the same anti-SLAPP case, which were eliminated except for the first one reported, chronologically, leaving a corpus of 4,180 documents. We proceeded to review for and eliminate those documents that were automatically flagged by the algorithm as cases including cross or counter claims. One hundred seventy-six such documents were identified and deleted from the data set. A final issue was noted in this stage: The presence of “In Re” captioned cases in which the plaintiff and defendant are not named and, therefore, could not be identified with the algorithm. These were deleted, resulting in a final data set of 3,980 cases in which an anti-SLAPP motion was filed in federal or state court in California. The results section follows.

Table 6. Summary of different Stages

Computer-based analysis	Human analysis	Results
Pre-Analysis: Performed on December 19/2019		Total cases identified: 6,738
Cutoff date: 10/30/2019		
Stage 1: Statistical analysis		Outcome: Total cases: 6,738 California cases: 4,940 (73.3%) State: 3,739 (75.7%) Federal: 1,201 (24.3%)
		Action taken: Analysis focused on California cases. In consequence we created a new set of only cases from California.
Stage 2: Attempt to identify anti-SLAPP parties by text mining the “Opinion” section. An algorithm was developed in R ver. 3.6 to extract initial paragraph containing the first reference of anti-SLAPP.	Legal expert reviewed a sample of 20 cases verifying plaintiffs and defendants identified.	Problem Identified: Results indicated that we could not consistently rely on the text extracted to identify both parties involved in an anti-SLAPP filing. A total review was required since there was not consistency in the text structure.

		We concluded that following this strategy we would need to review the whole document completely losing any advantage from an automated text extraction.
		Alternative route: Team went back to Nexis-Uni database to check additional case information. From the metadata of 1,000 cases we noticed that both parties were in the case caption, listing plaintiffs first and defendants second. The limitation was that we had more than 1,000 cases to analyze, so the decision was to extract the parties from case caption. This was performed in stage 3.
Stage 3: New approach tested with a pilot of 50 cases. An automated extraction, using a new R algorithm was executed searching for both parties within the case caption. An Excel file was created including case's title and two columns with plaintiffs and defendants, respectively.	Legal expert reviewed a sample of 50 cases verifying that plaintiff and defendant were accurately extracted.	Outcome: Parties' identification was validated. Team decided to run it on a larger sample
Stage 4a: We ran the R algorithm adding a routine to classify each party as (I)ndividual or (C)ompany. We used a dictionary of terms including terms such as Inc., LP, LLP, LLC. A set of 150 cases were selected based on randomly generated numbers to be reviewed. (*)	Legal expert reviewed the random sample of 150 cases to corroborate the identification of plaintiffs and defendants.	Problem Identified: We found less than 17% of incorrect parties' identification. In addition, we found two pairs of cases referring to the same original case, respectively.
		Action taken: A decision was made to only keep the earliest document referring to each case.
Stage 4b: We modified the algorithm looking to identify plaintiffs and defendants as filer or target of the anti-SLAPP claim. We selected 150 cases based on the same set of random numbers previously used to be reviewed on their parties' identification. (*)	Legal expert reviewed the random sample to corroborate plaintiffs and defendants' identification as filer or target.	Outcome: (Chi-square report) We found a new problem: counter-claim and cross-claim cases were identified when parties' classification failed.
		Action taken: Team decided to identify counter-claims and cross-claims which would be eliminated.
Stage 5:	Counter-claim and cross-claim cases	Outcome:

The algorithm was modified to identify cases involving counter-claims and cross-claims.

Cases in the Excel file were filtered based on the first 50 characters of their case titles to identify duplicates.

Stage 6:

After confirming that all steps worked, we conducted the automated analysis on the 4,940 cases from California

were eliminated. Duplicates were deleted, only keeping the last case of duplicates.

In total 1,364 duplicated cases were deleted, and 589 counter-claim/cross-claim cases were deleted.

(Cohen's Kappa inter-raters' reliability report)

The classification agreement between the algorithm and the human expert, is in the border between almost perfect, and substantial.

Outcome:

Cleansing the dataset of 4,940 records, obtaining a final dataset of 3,980 cases.