

# UNIVERSITY OF AMSTERDAM (UVA)/GREENPEACE INTERNATIONAL

## SLAPP RESEARCH: PROVISIONAL CONCLUSIONS

This research looks at 130 SLAPPs brought by individuals and companies in countries across Europe over a ten year period. It aims to identify common qualities of SLAPPs across the continent and the conditions that give rise to such lawsuits. In so doing, it seeks to identify common principles needed for any anti-SLAPP measures to be effective.

### HOW TO IDENTIFY A SLAPP

The definition of a SLAPP is straightforward: it is a **lawsuit** brought by a private individual (including those brought by public officials acting in a private capacity) with the intention of shutting down acts of **public participation**. The latter can encompass a range of activities, from peaceful protest to writing blogs – assuming the latter is in the public interest (defined by George Pring and Penelope Canan as pertaining to matters of “societal and political significance”).

*Identifying* the improper purpose of the lawsuit is more difficult, but can be inferred from a number of indicative

1. The remedies sought are unusually aggressive or disproportionate to the conduct targeted.
2. The plaintiff engages in procedural maneuvers intended to drag out the cost or drive up costs, such as pursuing appeals with little prospect of success.
3. The plaintiff appears to be exploiting its economic advantage to put pressure on the defendant.
4. The lawsuit targets individuals rather than just the organisation they work for.
5. The arguments relied on are factually or legally baseless.
6. The plaintiff uses the litigation process to intimidate and harass third-party critics (e.g. through the discovery process)
7. The lawsuit appears to be part of a wider public relations offensive or broader campaign to bully, harass or intimidate the target.
8. The plaintiff has a history of SLAPPs and/or legal intimidation (e.g. threats designed to scare critics into silence).

In order to fully understand the scope of SLAPPs in Europe, we sought to identify cases that fulfill the aforementioned characteristics, and analysed the way in which legislation or legal procedures were abused by SLAPP litigants to intimidate or harass public watchdogs. To this end, we contacted academics, lawyers, organizations, law clinics, media, and SLAPP victims from countries across Europe. The following report has been compiled with the information provided by these groups or individuals.

The countries studied in this report were chosen in order to create a representative sample of European jurisdictions (e.g. big and small, civil and common law), while being sure to include countries with a high number of reported SLAPPs. It is important to note, however, that the clinic was precluded from considering some countries due to language barriers: as such, there may be other countries in which SLAPPs are an issue and which require further research.



## SLAPPS IN EUROPE: COMMON QUALITIES

SLAPPs can take many forms, but there are several common trends identifiable across Europe.

### 1. DEFAMATION: THE WEAPON OF CHOICE

The most common law used to silence public watchdogs is defamation, used in **92.8%** of the cases we studied. The most common target were journalists (**22.4%** of the defamation cases we collected), especially those investigating government corruption (**20.8%** of cases) or exposing corporate abuses (**23.2%** of cases). However, we found abusive defamation cases used to shut down acts of peaceful protest, academic studies, and the publication of reports by advocacy groups. While the use of defamation claims by those looking to silence criticism may be common amongst the countries studied, it is clear there is no easy fix with the issue arising from one or more of a variety of (usually inrerrelated) factors:

- **BROAD DEFINITIONS:** imprecise or vaguely written laws can be seen in a number of jurisdictions. One example is Ukraine, which has a particularly vaguely written Civil Code. Watchdogs estimate that more than **900 SLAPPs** were brought under this piece of legislation in 2003 alone. Such ambiguity makes it easier for spurious lawsuits to reach full trial.
- **BURDEN OF PROOF:** in countries such as France, Malta, and the United Kingdom, the burden of proof in establishing the truth of an allegedly defamatory statement lies with the defendant. This can make the laws more susceptible to abuse. Mounting a defence can be enormously costly and time consuming, even where the defendant's legal position is sound. In such cases the most likely outcome is settlement, as was the case in multiple cases we studied in the UK.
- **BURDENSOME PROCEDURES:** In Italy, for example, plaintiffs can receive anonymity in order to protect reputation: a process that has the effect of flooding the Italian judiciary with frivolous lawsuits of aggravated defamation. SLAPP plaintiffs routinely appeal lawsuits that have been emphatically rejected, and often exploit inefficient court processes in countries such as Italy and Malta to further drag out abusive lawsuits. The disclosure process is most routinely used by SLAPP litigants to drive up costs: by the time the lawsuit against well-respected Nature Magazine in the UK was rejected in 2012, for example, the magazine had spent over **£1.5m** on legal costs.
- **MULTIPLE SUITS FROM SAME CHALLENGED STATEMENT:** many jurisdictions such as Malta allow for multiple suits to challenge the same material. This is achieved by breaking the text down into sentences supposedly containing separate allegations. This makes it easier for plaintiffs to use the litigation process to harass critics.
- **HIGH DAMAGES:** few of the jurisdictions studied imposed caps on the damages that could be claimed, allowing plaintiffs to maximise the capacity of the lawsuit to intimidate (particularly when coupled with ambiguously worded defamation laws). The highest damages claim we found was in France, where the Bollore Group – a serial SLAPP litigant - demanded more than **50 million** in damages from the TV Channel France 2.



## 2. LIBEL TOURISM

The ability of wealthy parties to exploit imbalance of power is further compounded by the ability to challenge the same statement(s) in multiple jurisdictions. As a result, SLAPP plaintiffs tend to gravitate to the same plaintiff-friendly jurisdiction such as France and the UK. This also allows plaintiffs to circumvent caps in damages and other procedural protections: hence Pilatus Bank was able to dodge the 11,640 EUR damage cap in Malta to demand **\$40 million** from Daphne Caruana Galizia in Arizona.

Two jurisdictions which seem to attract multiple SLAPPs, even if their targets are located in other states, are the United States and the United Kingdom. The threat of high damages, along with the high cost of legal representation, are key reasons for this development. Notable examples of this practice are the libel lawsuit filed in the UK last by Australian computer scientist Craig Wright, whose claim to invent Bitcoin has been called out as a scam by numerous experts, and the multiple lawsuits filed in France by the president of Equatorial Guinea and his son against French media and CSOs.

## 4. LACK OF LEGAL AID

Lastly, there is a systemic problem with legal aid. SLAPPs are usually filed by powerful corporations or individuals against individuals or groups with limited resources, and the sheer imbalance of resources can be sufficient to deter public participation. It is notoriously difficult to acquire legal aid in civil lawsuits, despite the ECtHR ruling in the 2005 *McLibel* case that sufficient legal aid must be available to ensure defendants are not placed at a “substantial disadvantage”. Even where legal aid is accessible, it is generally insufficient to counter the resources and experience of the lawyers working for corporations and powerful individuals – particularly where the lawsuit is filed in a foreign jurisdiction. The litigation process becomes a costly battle of David against Goliath, robbing the concept of a fair trial of any meaningful substance.

## 3. LACK OF PROCEDURAL PROTECTION

There is no specific anti-SLAPP legislation in Europe and limited options before courts to punish vexatious claimants. Generally the only power is to strike down claims or (with limitations) to award discretionary costs. The fact that such abusive lawsuits are not adequately addressed on both the national and supranational level means that, as of now, there are significant benefits and relatively few risks to filing them. Of the cases we studied, only eight (**6.4%**) were successful. In the absence of any significant sanctions, however, or limits on how long such cases can be dragged on for, a victory on the merits is unnecessary for a SLAPP to be successful. This is particularly true in jurisdictions with an inefficient judicial system: in Italy, for example, the average length of a civil dispute is **8 years** – almost four times the OECD average. As a result, in many cases the mere threat of legal action alone is sufficient. Providing courts with sufficient mechanisms to punish such abusers could go some way to addressing the power imbalance currently inherent in the legal system.

## 5. LEGAL THREATS

Due to a rigorous pre-litigation mechanism for filtering out frivolous claims, full SLAPPs appear to rarely manifest themselves in the German legal system. Despite this, there has been a discernible rise in the number of threats issued against activists and journalists. A study conducted by the German Otto Brenner Foundation found that, irrespective of the merits, editors were more willing to sign baseless cease-and-desist letters than defend their journalists in court. In Italy, meanwhile, a parliamentary anti-mafia committee found that mafia figures were increasingly using legal threats against journalists as a means of intimidation.

