

MEDIA LAW

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INTRODUCTION

There was no shortage of interesting and novel cases with First Amendment implications this *Survey* year. State and federal courts in the jurisdiction took on a range of cases involving important free press implications with newspapers and traditional journalists, as well as cases involving high-profile and widely popular media parties, ranging from comedian Jerry Seinfeld to popular television shows *Law & Order* and *Real Sports with Bryant Gumble*, to films such as *Couples Retreat*. Issues involving liability for internet-based content also emerged again this year.

I. DEFAMATION—ELEMENTS

A newspaper publisher’s ongoing public dispute with the mayor in

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the city he covered did not give rise to any state tort or federal retaliatory action, the Second Circuit affirmed in *Zherka v. Amicone*.¹ Plaintiff, owner and publisher of the *Westchester Guardian*, a weekly newspaper, printed stories critical of the mayor of Yonkers.² The mayor, in turn, made public comments at campaign events about plaintiff, among other things calling him a “convicted drug dealer,” an “Albanian mobster,” and a “thug.”³

Though the court reviewed the law of defamation, particularly libel per se, it could not find the statements were defamatory on their face.⁴ Further, plaintiff’s retaliatory claim under § 1983 was also unavailing because the mayor’s comments were not retaliatory under the law.⁵ The court succinctly summarized its decision and rationale:

This case does not require us to measure the constitutional dimensions of a state’s tort law. It simply asks: is the injury presumed by state law to arise from mere utterance of words solid enough ground on which to construct a federal constitutional tort claim? We have before us, in a sense, “speech against speech.” Zherka’s publications are core protected speech under the First Amendment. Amicone’s alleged retaliation did not come in the form of denial of a permit or threat of a lost contract. Rather, it was a group of statements—none very kind—about Zherka. Retaliatory insults or accusations may wound one’s soul, but by themselves they fail to cross the threshold of measurable harm required to move government response to public complaint from the forum of free speech into federal court.⁶

The HBO sports magazine show *Real Sports with Bryant Gumble* was the subject of continued motion practice this *Survey* term in *Mitre Sports International Ltd. v. Home Box Office Inc.*⁷ The libel suit stems from a segment on the show detailing child labor and the production of soccer balls in India and Pakistan.⁸ The court rejected plaintiff’s motion

1. 634 F.3d 642, 643 (2d Cir. 2011).

2. *Id.*

3. *Id.* at 643-44.

4. *Id.* at 645. The tort of libel per se allows a plaintiff to protect his or her reputation without proving general damages, which are implied, if the statement falls into one of the four categories of defamation: (1) imputing criminal activity; (2) injuring plaintiff’s reputation regarding trade, business, or profession; (3) imputing plaintiff suffers a loathsome disease; or (4) imputing unchastity of a woman. *Lieberman v. Gelstein*, 80 N.Y.2d 429, 435, 605 N.E.2d 344, 347, 590 N.Y.S.2d 857, 860 (1992).

5. *Zherka*, 634 F.3d at 646.

6. *Id.*

7. 2010 U.S. Dist. LEXIS 132756, at *1 (S.D.N.Y. 2010). The facts of this case were sufficiently discussed in last year’s *Survey*. See Roy S. Gutterman, *Media Law, 2009-10 Survey of New York Law*, 61 SYRACUSE L. REV. 879, 891-92 (2011).

8. *Mitre*, 2010 U.S. Dist. LEXIS 132756, at *5-7.

for summary judgment following a single deposition.⁹

Whether the television report stating the plaintiff engaged in child slave labor is defamatory under New York law remains a question that might have to go to a trier of fact, the court wrote.¹⁰ Aside from the elements of the tort—a written, false statement of fact about the plaintiff, published to a third party with either negligence or actual malice that causes damage—the language in question must “expose an individual ‘to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace’”¹¹

An inquiry into the meaning of the words can be a matter of law if there is no room to interpret the meaning.¹² The context of the statement is vital to its understanding.¹³ “However, if the words are susceptible to multiple meanings, some of which are not defamatory then it is for the trier of fact to determine how the words are to be understood,” the court wrote.¹⁴ Because the parties have widely different interpretations of the language at issue, the court found that the case should move on.¹⁵

The appellate division upheld dismissal of a slander per se action against *Steppin’ Out Magazine* which involved the existence of a sex tape involving the plaintiff in *Smigo v. NYP Holdings, Inc.*¹⁶ Here, a reporter had told a gossip newspaper about a tape that he had not actually seen.¹⁷ There was nothing defamatory about the statement and no negligence was shown in publication.¹⁸

II. DEFAMATION—PUBLIC/PRIVATE FIGURE/ACTUAL MALICE

Though a newspaper article was a tangential issue in *Geraci v. Probst*,¹⁹ the Court of Appeals reiterated several important issues relevant to the media including republication, elements of actual malice, and defamation.²⁰

9. *Id.* at *7.

10. *Id.* at *4.

11. *Id.* (quoting *Kimmerle v. N.Y. Evening Journal Inc.*, 262 N.Y. 99, 102, 186 N.E. 217, 218 (1933)).

12. *See id.* at *3-4.

13. *Mitre*, 2010 U.S. Dist. LEXIS 132756, at *4.

14. *Id.*

15. *Id.* at *7.

16. 80 A.D.3d 516, 516, 915 N.Y.S.2d 259, 260 (1st Dep’t 2011).

17. *Id.*

18. *Id.*

19. 15 N.Y.3d 336, 938 N.E.2d 917, 912 N.Y.S.2d 484 (2010).

20. *Id.* at 341-45, 938 N.E.2d at 920-23, 912 N.Y.S.2d at 487-90.

The Court held a newspaper article in *Newsday* was inappropriately admitted as evidence in a defamation case between two former business partners.²¹ Plaintiff alleged the newspaper republished a libelous allegation published in a letter, accusing plaintiff of criminal activity.²² A jury awarded plaintiff \$2.9 million in present and future damages, including \$500,000 in punitive damages, partially attributed to the republication of the defamatory content.²³ The newspaper, however, was not sued.²⁴

Liability can attach to parties who republish defamatory statements.²⁵ But the plaintiff's argument here was that defendant should somehow be held liable for the newspaper's subsequent publication even though he was not quoted, interviewed, or contacted by the newspaper.²⁶ There was also a question about whether republication was foreseeable and whether that foreseeability should be incorporated into the damages scheme.²⁷

The Court also delved into the substantive legal areas of defamation and actual malice. A defamatory statement is one which exposes a person to "hatred, contempt, aversion or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community."²⁸ The Court held that the false statements published in the letter did constitute a false statement of fact imputing criminal activity.²⁹ Damages in a libel per se claim can be presumed because they harmed plaintiff's professional reputation.³⁰ Because plaintiff was also a public official, he had to prove the elements of libel were made with actual malice, known falsity, or with reckless disregard for the

21. *Id.* at 343, 938 N.E.2d at 921, 912 N.Y.S.2d at 488.

22. *Id.* at 340-42, 938 N.E.2d at 919-21, 912 N.Y.S.2d at 486-88.

23. *Id.* at 341, 938 N.E.2d at 920, 912 N.Y.S.2d at 487.

24. *See Geraci*, 15 N.Y.3d at 341, 938 N.E.2d at 920, 912 N.Y.S.2d at 487.

25. *See id.* at 342 n.3, 938 N.E.2d at 921 n.3, 912 N.Y.S.2d at 488 n.3 (quoting *Firth v. New York*, 98 N.Y.2d 365, 371, 775 N.E.2d 463, 466, 747 N.Y.S.2d 69, 72 (2002)).

26. *Id.* at 343, 938 N.E.2d at 921, 912 N.Y.S.2d at 488. The court noted:

Notably, the article was published more than three years after Probst wrote the letter to the board. There is no evidence that Probst contacted anyone at *Newsday* in order to induce them to print the allegations. Nor is there evidence that anyone at *Newsday* contacted Probst regarding the story. Finally, there is no indication that Probst had any control over whether or not *Newsday* published the article.

Id.

27. *Id.* at 343-44, 938 N.E.2d at 921-22, 912 N.Y.S.2d at 488-89.

28. *Geraci*, 15 N.Y.3d at 344, 938 N.E.2d at 922, 912 N.Y.S.2d at 489 (quoting *Golub v. Enquirer/Star Grp., Inc.*, 89 N.Y.2d 1074, 1076, 681 N.E.2d 1282, 1283, 659 N.Y.S.2d 836, 837 (1997)).

29. *See id.* at 345, 938 N.E.2d at 923, 912 N.Y.S.2d at 490.

30. *Id.* at 344, 938 N.E.2d at 922-23, 912 N.Y.S.2d at 489-90.

truth.³¹ The Court remanded the case for a modified disposition on damages.³²

III. DEFAMATION—OPINION

The ongoing dispute over comedian Jerry Seinfeld's wife's children's cookbook continued in both state and federal courts.³³

In *Lapine v. Seinfeld*, a state supreme court dealt with a host of state law claims against the publisher for breach of contract, misappropriation, and defamation against Seinfeld himself.³⁴ The dispute prompted Seinfeld to make disparaging remarks about the plaintiff on *The Late Show with David Letterman* and *E! News*, calling her “a wacko,” “a nut,” and a plagiarist, while also likening her to a stalker and assassin.³⁵

These statements were deemed protected under the First Amendment, not only because of the comedic value, but under the opinion protection.³⁶ Determining that a statement is protected opinion, the court must look at a three-prong analysis: (1) whether the language has a precise meaning; (2) whether the statement can be proven true or false; and (3) the full context of the communications.³⁷

Thus, the court held it was “inconceivable that a reasonable view would have believed that Seinfeld's statements were conveying facts about [the plaintiff].”³⁸ The context of the comments, a televised comedy and variety show, was not the determining factor, the court said; however, the nature and tone of the language itself was more critical, the court held.³⁹ Further, the court said it was important under the First Amendment to allow a party to litigation to defend himself publicly.⁴⁰ The court likewise dismissed the breach of contract and the misappropriation claims against the publisher.⁴¹

31. *Id.* at 341, 938 N.E.2d at 920, 912 N.Y.S.2d at 487.

32. *Id.* at 345, 938 N.E.2d at 923, 912 N.Y.S.2d at 490.

33. *See infra* Part VIII.C for the discussion of the copyright dispute.

34. 31 Misc. 3d 736, 738, 918 N.Y.S.2d 313, 315 (Sup. Ct. N.Y. Cnty. 2011).

35. *Id.* at 752, 918 N.Y.S.2d at 326.

36. *Id.*

37. *Id.* at 752-53, 918 N.Y.S.2d at 326 (citing *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 153, 623 N.E.2d 1136, 1167, 603 N.Y.S.2d 813, 817 (1993)).

38. *Id.* at 753, 918 N.Y.S.2d at 327.

39. *Lapine*, 31 Misc. 3d at 756, 918 N.Y.S.2d at 328.

40. *Id.*, 918 N.Y.S.2d at 329.

41. *Id.* at 752, 918 N.Y.S. at 326.

IV. DEFAMATION—PRIVILEGE/SLAPP

The Second Circuit Court of Appeals issued a nuanced opinion in *Chandok v. Klessig*, affirming dismissal of a libel suit as well as an anti-Strategic Lawsuits Against Public Participation (SLAPP) counterclaim.⁴² The lawsuit arose after the plaintiff, a former post-doctorate researcher with a Cornell University affiliate, was accused of scientific misconduct with her biomedical research.⁴³ She argued that the defendant, her supervisor, had defamed her in numerous writings, including a retraction of a research paper she co-authored.⁴⁴

The district court dismissed the claim on summary judgment because plaintiff was a limited purpose public figure and she was unable to prove falsity of some of the statements or publication with actual malice, because the controversy could be considered a matter of public interest.⁴⁵ However, the Second Circuit focused its analysis on whether the allegedly defamatory statements were immune under state privilege.⁴⁶ The court wrote:

Summary judgment dismissing Chandok's defamation claim was appropriate because whether or not Klessig's Statements constituted speech on an issue of public concern, and whether or not Chandok was a public figure with respect to that issue, the Statements were within the scope of state-law qualified privileges for communications on a matter as to which Klessig had a duty to speak and/or for communications to persons with whom he had a common interest in the subject matter; those privileges cannot be overcome without a showing—by a preponderance of the evidence—of either “actual” malice or common-law malice, *i.e.*, spite or ill will; and Chandok did not adduce evidence sufficient to defeat those privileges even under a preponderance standard.⁴⁷

Invoking the seminal *New York Times v. Sullivan*⁴⁸ case, the court defined actual malice as the constitutional protection under the First Amendment requiring public officials in a state law defamation case to prove the defamatory statements were published either with known falsity or with reckless disregard for the truth.⁴⁹ Subsequent United

42. 632 F.3d 803, 805 (2d Cir. 2011).

43. *Id.* at 805-06.

44. *Id.* at 808-09.

45. *Id.* at 811-12 (citing *Chandok v. Klessig*, 648 F. Supp. 2d 449, 460 (N.D.N.Y. 2009)).

46. *Id.* at 813.

47. *Chandok*, 632 F.3d at 813.

48. 376 U.S. 254 (1964).

49. *Chandok*, 632 F.3d at 813 (citing *Sullivan*, 376 U.S. at 279-80).

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States Supreme Court cases applied the actual malice standard to public figures⁵⁰ and to plaintiffs involved in matters of public interest.⁵¹

The issue of state privilege, however, was more critical in the court's rationale.⁵² Defendant, here, had a qualified privilege to make the statements on both legal and moral grounds, the court held.⁵³ The legal obligation arose from the government funding of the research in question, while the moral obligation came with upholding the veracity of the questionable data in the community of biomedical researchers.⁵⁴ The court wrote:

The reputations and credibility of both institutions and all of these individual scientists were imperiled by the fact that they were explicitly associated with scientific articles that may have been predicated on fabricated research results or fraudulent reporting. The moral-obligation qualified privilege applies to at least the nine Statements sent to one or more of these . . . recipients.⁵⁵

The state qualified privilege applies to parties with a "common interest among communicants."⁵⁶ Further, the court held that no "rational" juror could find that the statements were published with actual or common law malice.⁵⁷

A separate issue on anti-SLAPP, a counterclaim filed by defendant had been dismissed by the district court and affirmed by the Second Circuit.⁵⁸ The anti-SLAPP statute is aimed at protecting parties from retaliatory defamation claims in matters of public or government interest.⁵⁹ The court refused to extend the statute to be held against plaintiff simply because she had received some federal funding for research.⁶⁰

A newspaper's investigative story about alleged misconduct in a Brooklyn hospital's emergency room was not actionable for a defamation claim.⁶¹ The newspaper relied heavily on a report by the

50. See, e.g., *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 162-64 (1967).

51. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974).

52. *Chandok*, 632 F.3d at 814-15.

53. *Id.* at 816.

54. *Id.*

55. *Id.*

56. *Id.* at 817.

57. *Chandok*, 632 F.3d at 817.

58. *Id.* at 817-18 (citing N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2012)).

59. *Id.* at 818.

60. *Id.* at 819.

61. *Rubel v. Daily News, LP*, No. 100023/10, 2010 N.Y. Slip Op. 32407(U), at 20-21 (Sup. Ct. N.Y. Cnty. 2010).

New York City Department of Investigation (DOI) which investigated the death of a woman at the hospital.⁶² The report, which named four doctors including plaintiff, raised numerous questions about procedures and actions by hospital staff the night of the death and in the days that followed.⁶³ Plaintiff, one of the doctors involved in the underlying case, sued the newspaper for libel.⁶⁴

Under New York Civil Practice Law and Rules (CPLR) 3211(a)(1), the newspaper argued the case should be dismissed because the government report it relied on for its reporting was privileged as a fair and accurate report of an official government proceeding.⁶⁵ Civil Rights Law section 74 immunizes parties—individuals and business entities—from liability for “a fair and true report of any judicial proceeding . . . or other official proceeding.”⁶⁶ The court held:

In accordance with the provisions of CRL [section] 74, defendants have shown that the published statements in the article were fair and true reports of the DOI proceedings which were the bases and focus of said statements and, as such, no civil action may be brought against these defendants for such publications.⁶⁷

The court also rejected plaintiff’s argument that he was defamed by a statement in the newspaper that he was being investigated by the district attorney.⁶⁸ The court believed this statement was not defamatory.⁶⁹

On the anti-SLAPP action, the court found the doctor was a “public permittee” under the law and the matter was of public interest and publicly reported in the news media.⁷⁰ However, the court rejected the newspaper’s argument that the lawsuit was a retaliatory action.⁷¹ Furthermore, the court wrote that the statute has never been applied to protect a newspaper or members of the news media:

The intent behind the statute was and is to protect citizen activists—not the media—who are at a disadvantage in defending lawsuits brought by the financially able public applicants or permittees who

62. *Id.* at 2-4.

63. *Id.*

64. *Id.* at 4-5.

65. *Id.* at 15; *see also* N.Y. C.P.L.R. 3211(a)(1) (McKinney 2012) (motion to dismiss on the grounds that a defense is founded upon documentary evidence).

66. *Rubel*, 2010 N.Y. Slip Op. 32407(U), at 15 (quoting *Palmieri v. Thomas*, 29 A.D.3d 658, 658, 814 N.Y.S.2d 717, 718 (2d Dep’t 2006)).

67. *Id.* at 19.

68. *Id.* at 18.

69. *Id.*

70. *Id.* at 7-8 (discussing N.Y. CIV. RIGHTS LAW § 76-a(1) (McKinney 2012)).

71. *Rubel*, 2010 N.Y. Slip Op. 32407(U), at 20.

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seek to quell opposition to their applications by private individuals or non-profit groups who cannot afford to defend such suits.⁷²

A newspaper's coverage of a nurse's federal lawsuit for, among other things, sexual harassment was properly dismissed as a fair and accurate report of a judicial proceeding, the appellate division held in *Tenney v. Press-Republican*.⁷³ News reports about the lawsuit, which may have focused on sensationalistic elements of the underlying dispute about plaintiff's wardrobe in a nursing home, were nonetheless protected under Civil Rights Law section 74 as a "fair and true" report of a judicial proceeding.⁷⁴

Similarly, a defamation case stemming from a newspaper's coverage of a separate defamation lawsuit was properly dismissed as privileged.⁷⁵

V. DEFAMATION—ONLINE IMMUNITY CDA SECTION 230

The Court of Appeals took a leap into the twenty-first century in *Shiamili v. Real Estate Group of New York*⁷⁶ in barring a defamation suit under section 230 of the Communications Decency Act (CDA).⁷⁷ This was the first time the Court has ruled on immunity for interactive computer services or websites that allow third parties to post comments or statements.⁷⁸ Section 230 immunity provides certain types of computer services or websites to operate without fear of liability for potentially defamatory comments posted by third-party users.⁷⁹

In this case, plaintiff was identified on a New York City real estate blog operated by defendant.⁸⁰ Blog entries posted in February 2008 made critical comments about plaintiff and his real estate company,

72. *Id.* (citing *Cholowsky v. Civiletti*, No. 1444/07, 2007 N.Y. Slip Op. 51742(U), at 2 (Sup. Ct. Suffolk Cnty. 2007).

73. 75 A.D.3d 868, 869, 905 N.Y.S.2d 356, 358 (3d Dep't 2010).

74. *Id.* at 868-69, 905 N.Y.S.2d 358 (3d Dep't 2010).

75. *Saleh v. N.Y. Post*, 78 A.D.3d 1149, 1152, 915 N.Y.S.2d 571, 575 (2d Dep't 2010) (ruling that despite procedural differences between a motion to dismiss and a motion for summary judgment, the defamation claim was properly dismissed under Civil Rights Law section 74).

76. 17 N.Y.3d 281, 952 N.E.2d 1011, 929 N.Y.S.2d 19 (2011).

77. *Id.* at 284, 952 N.E.2d at 1014, 929 N.Y.S.2d at 22; *see also* Communications Decency Act of 1996, 47 U.S.C. § 230 (2006).

78. *Shiamili*, 17 N.Y.3d at 284, 952 N.E.2d at 1014, 929 N.Y.S.2d at 22.

79. *Id.* at 286, 952 N.E.2d at 1015, 929 N.Y.S.2d at 23. In passing section 230, Congress, in 1996, sought to establish protections so "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.* (quoting 47 U.S.C. § 230(c)(1)).

80. *Id.* at 284-85, 952 N.E.2d at 1014, 929 N.Y.S.2d at 22.

including “Ardor Realty Sucks” and allegations that he was racist, anti-Semitic, an adulterer, and wife beater.⁸¹ The allegedly defamatory statements were posted anonymously on the blog run by one of the principals of defendant, The Real Estate Group.⁸² In an effort to clear his name, plaintiff submitted a lengthy response, which was posted on the blog, but he also requested the offensive content be taken down, which was rejected.⁸³

Procedurally, defendant sought dismissal based on CPLR 3211(a)(7) for failure to state a cause of action.⁸⁴ The trial court rejected the motion, but the appellate division reversed.⁸⁵ The Court of Appeals granted leave for appeal⁸⁶ to weigh in on two issues: whether section 230 immunity should be applied⁸⁷ and whether the underlying content could even be defamatory.⁸⁸

First, on section 230, the Court looked at the development of this body of law, which preempts state tort laws for interactive computer services, defined as “any person or entity that is responsible . . . for the creation or development of information provided through the Internet or any other interactive computer service.”⁸⁹

Drawing from the legislative history, the Court noted the law’s purpose was to provide for free flow of information without the confines for fear of tort liability.⁹⁰ The purpose was to “preserve the vibrant and competitive free market” for the exchange of ideas, information, and discourse on the internet.⁹¹

The Court also quoted a lengthy passage from the seminal case on section 230 immunity and defamation, *Zeran v. America Online, Inc.*, a 1997 decision from the Fourth Circuit Court of Appeals.⁹² Though

81. *Id.* at 285, 952 N.E.2d at 1014, 929 N.Y.S.2d at 22 .

82. *Shiamili*, 17 N.Y.3d at 284, 952 N.E.2d at 1014, 929 N.Y.S.2d at 22.

83. *Id.* at 285, 952 N.E.2d at 1014, 929 N.Y.S.2d at 22.

84. *Id.* at 286, 952 N.E.2d at 1015, 929 N.Y.S.2d at 23.

85. *See Shiamili v. Real Estate Grp. of N.Y., Inc.*, No. 600460/08, 2008 N.Y. Slip Op. 33479(U), at 1 (Sup. Ct. N.Y. Cnty. 2008) (motion to dismiss denied), *rev'd*, 68 A.D. 3d 581,582, 892 N.Y.S. 2d 52, 53 (1st Dep’t 2010) (granting motion to dismiss).

86. *See Shiamili v. Real Estate Grp. of N.Y., Inc.*, 15 N.Y.3d 705, 934 N.E.2d 322, 907 N.Y.S.2d 753 (2010) (granting leave to appeal).

87. *Shiamili*, 17 N.Y.3d at 286-89, 952 N.E.2d at 1015-17, 929 N.Y.S.2d at 24-25.

88. *Id.* at 290-91, 952 N.E.2d at 1018, 929 N.Y.S.2d at 26.

89. *Id.* at 286-87, 952 N.E.2d at 1015-16, 929 N.Y.S.2d at 23-24 (quoting 47 U.S.C. § 230(f)(3)(2006)).

90. *Id.* at 287, 952 N.E.2d at 1016, 929 N.Y.S.2d at 24.

91. *Id.* (quoting 47 U.S.C. § 230(b)(2)).

92. *Shiamili*, 17 N.Y.3d at 287, 952 N.E.2d at 1016, 929 N.Y.S.2d at 24; *see also Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (holding Congress intended to limit government’s regulation on the Internet by providing interactive computer services

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numerous federal courts of appeals have ruled on section 230 immunity, the Court of Appeals passed on an opportunity to rule on this back in 1999.⁹³ However, the Court wrote: “[t]oday, we follow what may fairly be called the national consensus and read section 230 as generally immunizing Internet service providers from liability for third-party content wherever such liability depends on characterizing the provider as a ‘publisher or speaker’ of objectionable material.”⁹⁴

Plaintiff made an interesting argument that liability should attach because the website was inherently a publisher or content provider, not a distributor subject to immunity.⁹⁵ The Court answered:

We reject Shiamili’s contention that defendants should be deemed content providers because they created and ran a Web site which implicitly encouraged users to post negative comments about the New York City real estate industry. Creating an open forum for third parties to post content—including negative commentary—is at the core of what section 230 protects.⁹⁶

Thus, simply creating a website and even inviting users to post comments does not subvert immunity, nor does reposing, the Court held.⁹⁷

On the substantive question of whether the comments posted could even have defamatory impact, the Court also rejected plaintiff’s claim.⁹⁸ The statement that plaintiff was “King of the Token Jews” and an accompanying satirical illustration could not reasonably be interpreted as factual.⁹⁹ “The illustration was obviously satirical and, although offensive, it cannot by itself support Shiamili’s claim of defamation.”¹⁰⁰ Defendant’s postings of headlines and subheads did not move the court either.¹⁰¹ A passionate dissent by Chief Judge Lippman was filed

immunity from tort liability in both federal and state jurisdictions. Thus, the Internet would be a place for the unfettered and robust exchange of ideas.)

93. *Shiamili*, 17 N.Y.3d at 288-89, 952 N.E.2d at 1017, 929 N.Y.S.2d at 25; *see Lumney v. Prodigy Servs. Co.*, 94 N.Y.2d 242, 252, 723 N.E.2d 539, 543, 701 N.Y.S.2d 684, 688 (1999) (the Court granted summary judgment in a case about an allegedly defamatory email, but decided not to venture into the rapidly developing areas of modern technology and section 230 immunity).

94. *Shiamili*, 17 N.Y.3d at 288-89, 952 N.E.2d at 1017, 929 N.Y.S.2d at 25.

95. *Id.* at 290-91, 952 N.E.2d at 1018, 929 N.Y.S.2d at 26.

96. *Id.*

97. *Id.* at 291, 952 N.E.2d at 1018, 929 N.Y.S.2d at 26.

98. *Id.* at 292-93, 952 N.E.2d at 1019-20, 929 N.Y.S.2d at 27-28.

99. *Shiamili*, 17 N.Y.3d at 292-93, 952 N.E.2d at 1019-20, 929 N.Y.S.2d at 27-28.

100. *Id.* at 292-93, 952 N.E.2d at 1020, 929 N.Y.S.2d at 28.

101. *Id.* at 293, 952 N.E.2d at 1020, 929 N.Y.S.2d at 28.

objecting to the decision.¹⁰²

A state trial court deemed a website allowing users to post comments about dentists was an internet computer service subject to CDA section 230 immunity in *Reit v. Yelp!, Inc.*¹⁰³ Here, a dentist claimed that he was defamed by a negative anonymous posting on a website that allows public comments about businesses and professional services.¹⁰⁴ The website had also posted ten positive reviews about plaintiff, which he said the website later took down after he called to complain.¹⁰⁵ Following the one negative posting, which described his office as “small,” “old,” and “smelly” with “old equipment,” plaintiff alleged his business significantly dropped, causing damage and harm to his reputation.¹⁰⁶

Section 230 immunity attaches protection to interactive computer services (ICS).¹⁰⁷ Content providers, including web-based content providers, may be held liable for defamatory content.¹⁰⁸ Even though plaintiff acknowledged that Yelp! was an interactive computer service under the statute, he argued that it maintained significant control over its content to warrant liability.¹⁰⁹ Yelp!, as an ICS, however, was protected and immunized under the law because the comments were posted by a third party, the court said.¹¹⁰

Plaintiff also argued that the website engaged in deceptive business practices because it manipulated its algorithms, sold advertising, and deceived businesses, a novel cause of action the court said required a closer examination.¹¹¹ Under General Business Law section 349(a), a deceptive practice claim requires proof of “(1) consumer-oriented conduct that is (2) materially misleading” and that (3) causes plaintiff injury.¹¹² The court rejected the claim, writing that even though Yelp! deleted postings, possibly to attract advertisers, it was not consumer-

102. *Id.* at 293-95, 952 N.E.2d at 1020-22, 929 N.Y.S.2d at 28-30 (Lippman, J., dissenting).

103. 29 Misc. 3d 713, 717, 907 N.Y.S.2d 411, 414 (Sup. Ct. N.Y. Cnty. 2010).

104. *Id.* at 715, 907 N.Y.S.2d at 412.

105. *Id.*

106. *Id.*

107. *Id.* at 715-16, 907 N.Y.S.2d at 413.

108. *Reit*, 29 Misc. 3d at 715-16, 907 N.Y.S.2d at 413.

109. *Id.* at 716, 907 N.Y.S.2d at 413.

110. *Id.* at 716-17, 907 N.Y.S.2d at 413-14,

111. *Id.* at 717-18, 907 N.Y.S.2d at 414,

112. *Id.* at 718, 907 N.Y.S.2d at 415 (quoting *City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 621, 911 N.E.2d 834, 838, 883 N.Y.S.2d 772, 776 (2009)).

oriented conduct.¹¹³

In a federal case, a website that connects people with moving companies was held immune from liability under section 230 in a dispute between a mover and a truck rental company.¹¹⁴

VI. DEFAMATION—MISCELLANEOUS

A. Statute of Limitations

A defamation claim relating to old news stories was properly barred by the one-year statute of limitations for the tort in *Haefner v. New York Media LLC*, the appellate division held.¹¹⁵ Access to the article in question, which was also deemed not actionable on the group libel doctrine, was not republished because it continues to be viewed online or in electronic databases.¹¹⁶

B. Discovery

A pre-action discovery motion seeking to identify the posters of critical anonymous emails was properly dismissed in *Sandals Resorts International Ltd. v. Google Inc.*, an appellate court held.¹¹⁷

Affirming the lower court's findings that the critical and offensive statements were not defamatory under the opinion privilege, the court refused to unmask the posters or compel disclosure.¹¹⁸ The court summarized its rationale, writing “[e]ven were we to find that the petition sufficiently alleged that the subject e-mail injured Sandals’ business reputation or damaged its credit standing, we still would deny the application for disclosure of the account holder’s identification on the ground that the subject email is constitutionally protected opinion.”¹¹⁹

Batra v. Wolf, the first libel suit ever levied against the long-time legal drama *Law & Order*, continued through discovery litigation.¹²⁰

113. *Reit*, 29 Misc. 3d at 718, 907 N.Y.S.2d at 415.

114. *See generally* *Coppage v. U-Haul Int’l, Inc.*, 2011 U.S. Dist. LEXIS 14801 (S.D.N.Y. 2011).

115. *See* 82 A.D.3d 481, 481-82, 918 N.Y.S.2d 103, 104 (1st Dep’t 2011).

116. *Id.*

117. 86 A.D.3d 32, 38, 925 N.Y.S.2d 407, 411 (1st Dep’t 2011) (reviewing standards for pre-action discovery under N.Y. C.P.L.R. 3102(c) (McKinney 2012)).

118. *Id.* at 39, 925 N.Y.S.2d at 413.

119. *Id.*

120. *See* 32 Misc. 3d 456, 922 N.Y.S.2d 735 (Sup. Ct. N.Y. Cnty. 2010); *see also* Roy S. Gutterman, *Media Law, 2007-08 Survey of New York Law*, 59 SYRACUSE L. REV. 953, 962-63 (2009) (discussing the underlying lawsuit in *Batra v. Wolf*).

Ruling on two separate motions to compel disclosure under CPLR 3124, a state supreme court refused to allow defendants to include materials and certain forms and paperwork developed during the show's writing process to be included on defendant's privilege log.¹²¹ The materials were not created with the intent to remain confidential or in preparation of litigation, thus rendering them discoverable as plaintiff seeks to prove that he was defamed by the episode with a character bearing a similar name and likeness.¹²² The court also ordered defendant to turn over agreements between defendants with regard to the episode in question and *New York Times* newspaper delivery tags.¹²³

The other decision in the case involved a motion to compel depositions of four high-level defendants, including Dick Wolf, the show's creator.¹²⁴ The court noted that because the four defendants sought for deposition might be so far outside the chain of command that their day-to-day knowledge of the underlying facts might be remote.¹²⁵

C. Headlines/IIED

A misleading headline in a newspaper story about a hunting accident was not defamatory, a federal district court held.¹²⁶ In *Triano v. Gannett Satellite Information Network, Inc.*, the court analyzed whether a headline alone could be actionable.¹²⁷ Though the headline gave a false impression by imputing criminal activity, it did not identify plaintiffs.¹²⁸ The court wrote:

In other words, even if the headline was literally false, the full context of the article contradicted the headline and was substantially true such that the reasonable reader likely would conclude that the headline was inaccurate, and not that Morrone shot and killed Triano. Thus, to the extent that the article made a statement of fact, it was not defamatory to either plaintiff.¹²⁹

The court applied the well-established doctrine that a publisher's accuracy only have to be substantially true or the "gist" of the statement

121. *Batra*, 32 Misc. 3d at 459-60, 922 N.Y.S.2d at 739-40.

122. *Id.*

123. *Id.* at 461, 922 N.Y.S.2d at 741.

124. *Batra v. Wolf*, No. 116059/04, 2010 N.Y. Slip Op. 52400(U), at 2 (Sup. Ct. N.Y. Cnty. 2010).

125. *Id.*

126. *See Triano v. Gannett Satellite Info. Network, Inc.*, 2010 U.S. Dist. LEXIS 105175, at *5-6 (S.D.N.Y. 2010).

127. *Id.* at *13.

128. *Id.* at *5-6, *15.

129. *Id.* at *16.

has to be true.¹³⁰ Further, headlines have to represent a “fair index” of a story to avoid liability.¹³¹ Finally, the court noted that in New York falsely or prematurely announcing someone’s death is not capable of defamatory meaning.¹³²

The claim for intentional infliction of emotional distress was also dismissed because not only did plaintiff not adequately pursue the claim in pleadings, but New York bars these claims when based on facts of an underlying libel case.¹³³ Furthermore, plaintiff failed to establish the elements of the torts of intentional or negligent infliction of emotional distress.¹³⁴ Finally, the court held, “[a]t most, what [p]laintiffs have alleged is that Gannet made a mistake. There is no plausible claim that this mistake was outrageous or atrocious.”¹³⁵

VII. INVASION OF PRIVACY

A bikini model whose photograph appeared in segments totaling nine seconds in the movie *Couples Retreat* could not bring an invasion of privacy claim in *Krupnik v. NBC Universal Inc.*¹³⁶ Plaintiff sought damages for use of the photograph that appeared in a nine-second segment in the movie, which was accompanied by a crude and vulgar connotation.¹³⁷ However, when the photograph was initially taken nine years earlier, plaintiff signed an extensive release in exchange for payment.¹³⁸ Among other indemnifications, plaintiff gave up rights to future tort claims, including defamation and invasion of privacy.¹³⁹

In addition to enforcing the release, the court invoked New York’s long-standing formulation of invasion of privacy under Civil Rights Law sections 50 and 51, which defines the tort as unlawful

130. *Id.* at *17 (citing *Mitre Sports Int’l Ltd. v. Home Box Office, Inc.*, 2010 U.S. Dist. LEXIS 37494, at *4-5 (S.D.N.Y. Apr. 15, 2010)).

131. *Triano*, 2010 U.S. Dist. LEXIS 105175, at *13 (citing *Mondello v. Newsday, Inc.*, 6 A.D.3d 586, 587, 774 N.Y.S.2d 794, 794 (2d Dep’t 2004)).

132. *Id.* at *18 (citing *Cohen v. N.Y. Times Co.*, 153 A.D. 242, 246, 138 N.Y.S. 206, 210 (2d Dep’t 1912)).

133. *Id.* at *20 (citing *Idema v. Wager*, 120 F. Supp. 2d 361, 370 (S.D.N.Y. 2000)).

134. *Id.* at *20-22. In New York, IIED requires outrageous conduct so extreme it falls outside the bounds of decency to be “atrocious and utterly intolerable in a civilized community.” *Id.* at *20-21 (quoting *Marilyn S. v. Indep. Grp. Home Living Program, Inc.*, 73 A.D.3d 892, 894, 903 N.Y.S.2d 403, 406 (2d Dep’t 2010)).

135. *Triano*, 2010 U.S. Dist. LEXIS 105175, at *21.

136. *Krupnik v. NBC Universal, Inc.*, 39 Media L. Rep. (BNA) 1634, 1634-36 (Sup. Ct. N.Y. Cnty. 2010).

137. *See id.* at 1636-37.

138. *Id.* at 1635.

139. *Id.* at 1636.

appropriation of someone's image or likeness for commercial purposes.¹⁴⁰ The court held:

The complaint is devoid of any allegation that [*Couples Retreat*] was an advertisement or solicitation of patronage, or that the brief images of plaintiff were intended to draw business to defendants. Furthermore, New York courts have repeatedly ruled that use of a person's likeness in movies or other entertainment media, similar to the circumstances here, does not constitute use for advertising or purposes of trade, and are not actionable . . . definitions of "advertising" or "trade."¹⁴¹

VIII. INTELLECTUAL PROPERTY

A. Copyright Jurisdiction

A copyright infringement claim against an out-of-state web-based company accused of infringement or facilitating infringement of copyrighted materials owned by a New York-based company was properly sited in New York's federal courts, the Court of Appeals certified in *Penguin Group (USA) Inc. v. American Buddha*.¹⁴² Last year, the Second Circuit Court of Appeals sent the case to the Court of Appeals for certification on the jurisdictional question under New York's Long-Arm Statute.¹⁴³

The Court did not make any substantive findings in the underlying claim that defendant infringed on plaintiff's copyrights or engaged in any form of piracy or facilitated illegal downloads of the four books.¹⁴⁴ The Court simply focused on the jurisdictional question under the state's long-arm statute, CPLR section 302(a)(3)(ii), because the federal Copyright Act does not have a jurisdiction component.¹⁴⁵

A copyright infringement case with an internet-based defendant differentiates this case from a traditional commercial or tort dispute, the Court wrote.¹⁴⁶ To determine whether an out-of-state defendant

140. *Id.* at 1636-37 (applying N.Y. CIV. RIGHTS Law §§ 50-51 (McKinney 2009)).

141. *Krupnik*, 39 Media L. Rep. (BNA) at 1639 (citing *Costanza v. Seinfeld*, 279 A.D.2d 255, 255, 719 N.Y.S.2d 29, 30 (1st Dep't 2001)).

142. 16 N.Y.3d 295, 304-06, 946 N.E.2d 159, 164-65, 921 N.Y.S.2d 171, 176-77 (2011).

143. *See* *Penguin Grp. (USA) Inc. v. American Buddha*, 609 F.3d 30, 42 (2d Cir. 2010); *see also* Roy S. Gutterman, *Media Law, 2009-10 Survey of New York Law*, 61 SYRACUSE L. REV. 879, 900-01 (2011).

144. *Penguin Grp.*, 16 N.Y.3d. at 305 n.3, 946 N.E.2d at 164 n.3, 921 N.Y.S.2d at 176 n.3.

145. *Id.* at 299-300, 946 N.E.2d at 160-61, 921 N.Y.S.2d at 172-73.

146. *Id.* at 306, 946 N.E.2d at 165, 921 N.Y.S.2d at 177.

satisfied the elements of the long-arm statute, the Court looks at five factors under CPLR 302(a)(3)(ii): (1) defendant's tortious action outside the state; (2) the cause of action arose from the act; (3) the tortious act injured a person or property in New York State; (4) defendant expected or should have reasonably expected the act would have consequences in the state; and (5) that defendant derived substantial revenue from interstate or international commerce.¹⁴⁷

Integral to the Court's analysis here was the nature of the injury plaintiff suffered.¹⁴⁸ Within the "bundle of rights" a copyright owner holds are the rights to reproduce protected work, grant or deny licenses to reproduce work, and profit from any reproduction.¹⁴⁹ Defendant is accused of uploading copies onto its website four books owned by plaintiff and allowing its members to download the book without paying fees or royalties.¹⁵⁰ The Court wrote:

In sum, the role of the Internet in cases alleging the uploading of copyrighted books distinguishes them from traditional commercial tort cases where courts have generally linked the injury to the place where sales or customers are lost. The location of the infringement in online cases is of little import inasmuch as the primary aim of the infringer is to make the works available to anyone with access to an Internet connection, including computer users in New York. In addition, the injury to a New York copyright holder, while difficult to quantify, is not as remote as a purely indirect financial loss due to the broad spectrum of rights accorded by copyright law. The concurrence of these two elements—the function and nature of the Internet and the diverse ownership rights enjoyed by copyright holders situated in New York . . . we conclude that the alleged injury in this case occurred in New York for purposes of CPLR 302(a)(3)(ii).¹⁵¹

B. Copyright/Hot News

The Second Circuit refused to find a "hot news" exception to the Copyright Act in *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*¹⁵² This complicated modern media case dealt with a small web-based financial journalism website and aggregator accused of free-riding the stock recommendations produced by several well-known and well-established financial analyst firms including Barclays Capital, Merrill

147. *Id.* at 302, 946 N.E.2d at 162, 921 N.Y.S.2d at 174.

148. *Id.* at 304, 946 N.E.2d at 163, 921 N.Y.S.2d at 175.

149. *Penguin Grp.*, 16 N.Y.3d at 305, 946 N.E.2d at 164, 921 N.Y.S.2d at 176.

150. *Id.* at 304-05, 946 N.E.2d at 163-64, 921 N.Y.S.2d at 175-76.

151. *Id.* at 306-07, 946 N.E.2d at 165, 921 N.Y.S.2d at 177 (citation omitted).

152. 650 F.3d 876, 878 (2d Cir. 2011).

Lynch, Pierce, Fenner & Smith, and Morgan Stanley.¹⁵³ The district court issued a detailed opinion after a bench trial, finding Theflyonthewall.com (“The Fly”) liable for violating the New York tort of hot news misappropriation.¹⁵⁴

Defendant appealed both the finding and an injunction prohibiting it from disseminating the information.¹⁵⁵

In reversing the trial court, the Second Circuit’s detailed opinion took great steps to clarify the technical and somewhat esoteric issue of whether the hot news tort in this case was actually preempted by the federal Copyright Act.¹⁵⁶ Much like the trial court, the appellate panel focused on two long-standing precedents: *National Basketball Ass’n v. Motorola, Inc.*¹⁵⁷ and *International News Service v. Associated Press.*¹⁵⁸

The appellate court called the trial court’s analysis of the hot news doctrine “determinative,” and speculated that it might certify the question of the tort’s viability to the Court of Appeals.¹⁵⁹ The sole issue before the court, thus, was whether the tort was preempted by the federal law.¹⁶⁰

The court held: “[w]e conclude that applying *NBA* and copyright preemption principles to the facts of this case, the Firms’ claims for “hot news” misappropriation fails because it is preempted by the Copyright Act.”¹⁶¹

By applying the hard rules of hot news doctrine, the court found The Fly was not “free riding” on plaintiff’s work, which put the analysis back into a discussion of preemption.¹⁶² The business news content The Fly repackaged and sent out failed two prongs under *NBA*, the court

153. *See id.*

154. *Id.* at 887; *see also* Barclays Capital Inc. v. Theflyonthewall.com, 700 F. Supp. 2d 310, 348 (S.D.N.Y. 2010).

155. *Barclays Capital*, 650 F.3d at 889-90.

156. *See id.* at 890-91.

157. *Id.* at 890-94 (citing *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997)). The state “hot news” doctrine is a viable cause of action if plaintiff can establish five elements: (1) plaintiff must generate or gather information at a cost; (2) the data is time-sensitive; (3) defendant’s use is a “free ride” on plaintiff’s work; (4) defendant is in direct competition with a product or service generated by plaintiff; (5) the free riding reduces the incentive to produce the service or product or its quality is substantially harmed. *Nat’l Basketball Ass’n*, 105 F.3d at 845.

158. *Barclays Capital*, 650 F.3d at 894 (citing *Int’l News Serv. v. Associated Press*, 248 U.S. 215 (1918) (establishing hot news misappropriation and its viability as a state-based tort despite the enforcement of the U.S. Copyright Act)).

159. *Id.* at 889-90.

160. *Id.* at 890.

161. *Id.* at 902 (emphasis in original).

162. *Id.* at 902-03.

said.¹⁶³ The Fly, the court pointed out, was not selling information created by plaintiffs but acted more as a news organization and aggregator, thus was not “free riding” under either *NBA* or *INS*.¹⁶⁴ Further, just because plaintiffs, through their financial recommendations and data were able to make news, the court noted, “does not give rise to a right for it to control who breaks that news and how.”¹⁶⁵

C. Copyright Infringement

In *Lapine v. Seinfeld*,¹⁶⁶ the Second Circuit affirmed the dismissal of the copyright and trademark infringement lawsuit by plaintiff, the author of a cookbook, who claimed Harper Collins and Seinfeld’s wife, Jessica, plagiarized and impermissibly copied her idea for a book about clandestinely putting nutritious foods into dishes prepared for children.¹⁶⁷ While stockpiling vegetable purees “is an idea that cannot be copyrighted,”¹⁶⁸ the Second Circuit also wrote that the “total concept and feel” of the two books was “very different.”¹⁶⁹

The popular television sitcom *Modern Family* was the subject of an extensive lawsuit alleging copyright infringement and a variety of state tort claims in *Alexander v. Murdoch*.¹⁷⁰ Plaintiff, a writer who represented himself in the proceedings, claimed a host of defendants involved in the development, production, broadcast, and distribution of *Modern Family*, had illegally infringed on a copyrighted treatment of a television show he created titled *Loony Ben*.¹⁷¹ *Modern Family*, he said, unlawfully copied and appropriated his quirky characters and plots from materials he created and proposed to television agents, producers, directors, and executives.¹⁷²

Copyright infringement requires proof that there was a valid copyright, owned by plaintiff, accessed by defendant, and copied with “substantial similarity.”¹⁷³

The district court adopted the findings and recommendations by a

163. *Barclays Capital*, 650 F.3d at 902-03.

164. *Id.* at 905.

165. *Id.* at 907.

166. 375 F. App’x 81 (2d Cir. 2010).

167. *Id.* at 82, 85.

168. *Id.* at 83.

169. *Id.*

170. *See generally* No. 10-cv-5613, 2011 U.S. Dist. LEXIS 79503 (S.D.N.Y. 2011).

171. *Id.* at *3-4.

172. *Id.*

173. *Id.* at *9-10 (citing *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 63 (2d. Cir. 2010)).

district court magistrate judge.¹⁷⁴ In dismissing the claims, the court compared the shows' plot,¹⁷⁵ characters,¹⁷⁶ setting,¹⁷⁷ format and pace,¹⁷⁸ and "total concept and feel."¹⁷⁹ State tort claims for misappropriation of ideas and defamation were also dismissed.¹⁸⁰

While finding no substantial similarity between the two shows, the court concluded that "neither an ordinary observer nor a more discerning one would see any similarity between [*Loony Ben*] and [*Modern Family*] beyond the general idea of a sitcom focusing on a large extended family including many different kinds of people—elements which are neither copyrightable nor evidence of substantial similarity."¹⁸¹

D. Trademark

The intellectual property rights of the legendary martial arts actor Bruce Lee, who died in 1973, were the subject of a complicated lawsuit weighing substantive intellectual property law, state law claims in both New York and California, and federal civil procedure issues in *Bruce Lee Enterprises, LLC v. A.V.E.L.A., Inc.*¹⁸²

Objecting to the unauthorized use of Lee's image in t-shirts, the company that owns the rights to Lee's image and other intellectual property rights sued the four defendants in federal court in Indiana before it was removed it to New York.¹⁸³ Defendants included producers of the shirts, A.V.E.L.A., and its principal, Leo Valencia, and two major retailers which sold the allegedly unauthorized merchandise: Target and Urban Outfitters.¹⁸⁴

The court ruled on two procedural motions based on personal jurisdiction under Federal Rules of Civil Procedure 12(b)(1) and failure to state a claim under 12(b)(6).¹⁸⁵ Defendants were judicially estopped from their jurisdiction argument because in their removal papers, they

174. *Id.* at *4; *see also generally* Alexander, v. Murdoch, No. 10-cv-5613, 2011 U.S. Dist. LEXIS 79543 (S.D.N.Y. 2011) (magistrate's findings and recommendations).

175. *Alexander*, 2011 U.S. Dist. LEXIS 79503 at *11-13.

176. *Id.* at *13-21.

177. *Id.* at *21.

178. *Id.* at *21-23.

179. *Id.* at *23.

180. *Alexander*, 2011 U.S. Dist. LEXIS 79503, at *23-27. Plaintiff argued he was defamed when producers omitted his name from the show's credits. *Id.* at *25-27.

181. *Id.* at *29.

182. No. 10-cv-2333, 2011 U.S. Dist. LEXIS 36406 (S.D.N.Y. 2011).

183. *Id.* at *4-6.

184. *Id.* at *2.

185. *Id.* at *2-3.

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chose the Southern District as a more appropriate venue for the suit.¹⁸⁶

The discussion on the substantive issues including violations of the Lanham Act's false endorsement cause of action¹⁸⁷ reiterated the interesting intellectual property rights that outlive celebrities.¹⁸⁸ There was no question of whether plaintiff legitimately owned Lee's image.¹⁸⁹ Similarly, the court pointed to a similar, and successful, suit by the entity that owned the rights to the image of the late reggae singer Bob Marley.¹⁹⁰ The use of Lee's image on t-shirts could be construed as a false celebrity endorsement and a violation of the trademark, and thus was properly plead, the court ruled.¹⁹¹ The court laid it out:

Plaintiff's Lanham Act claim is properly understood as a claim of false endorsement. To state a claim for false endorsement under *section 43(a)(1)(A)*, Plaintiff must allege "that the defendant, (1) in commerce, (2) made a false or misleading representation of fact (3) in connection with goods or services (4) that is likely to cause consumer confusion as to origin, sponsorship, or approval of goods or services."¹⁹²

Several claims based on both California and New York law partially survived dismissal.¹⁹³ For example, the common law unfair competition claim against A.V.E.L.A. and Valencia survived because defendants appear to have ignored plaintiff's cease and desist order, as proof of bad faith.¹⁹⁴ But the retailers, Target and Urban Outfitters, were dismissed from that claim.¹⁹⁵

186. *Id.* at *6-12. In dismissing the jurisdictional motion, the court wrote [t]he judicial estoppel criteria are met in the instant case because 1) [d]efendants now argue that this [c]ourt lacks personal jurisdiction, contradicting their position in the prior proceeding in the Southern District of Indiana that transfer to this [c]ourt would be proper, and 2) the Southern District of Indiana adopted that prior position in granting the motion to transfer.

Bruce Lee Enters., 2011 U.S. Dist. LEXIS 36406 at *11.

187. *Id.* at *14-18; *see also* 15 U.S.C. § 1125(a) (2006).

188. *Bruce Lee Enters.*, 2011 U.S. Dist. LEXIS 36406 at *14-18.

189. *Id.* at *17.

190. *Id.* at *16 (citing *Fifty-Six Hope Rd. Music, Ltd., v. A.V.E.L.A., Inc.*, 688 F. Supp. 2d 1148 (D. Nev. 2010)).

191. *Id.* at *17-18.

192. *Id.* at *14 (quoting *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 455 (S.D.N.Y. 2008)).

193. *Bruce Lee Enters.*, 2011 U.S. Dist. LEXIS 36406 at *18-21. The state law claims are: common law unfair competition under New York law; right of publicity under California law; common law right of publicity and unjust enrichment. *Id.*

194. *Id.* at *18-19.

195. *Id.* at *19.

IX. STUDENT SPEECH

The Second Circuit affirmed dismissal of a student's challenge to censorship of a cartoon in the Ithaca High School student newspaper in *R.O. v. Ithaca City School District*.¹⁹⁶

The court touched on all four Supreme Court precedents on student and school speech in deciding that the cartoon was legitimately banned from the newspaper because it was deemed overly sexual and lewd.¹⁹⁷ Primarily, though the court ruled the school district's censorship of the student newspaper, *The Tattler*, and later the student's attempt to self-publish a newspaper and distribute it on campus, did not offend the First Amendment.¹⁹⁸

The court based its decision on two long-standing precedents, *Fraser*, which permits schools—teachers, principals, and administrators—to ban or even punish speech deemed lewd, vulgar, obscene, or inappropriate to the school-age audience,¹⁹⁹ and *Hazelwood*, which governs school-sponsored speech, with a focus on student newspapers.²⁰⁰

First, although the cartoon fell below the standard for obscenity, it was still lewd, inappropriate, and offensive for a school setting.²⁰¹

“The censored cartoon that is in the record before us contains drawings of stick figures in various sexual positions and is unquestionably lewd,” the court found, adding that administrators acted legally under *Fraser*.²⁰² Following the rationale under *Hazelwood*, the court pronounced *The Tattler* a limited public forum, and the court held the district could exercise a range of restrictions—including outright censorship—because the student newspaper was educational and related to a legitimate pedagogical purpose.²⁰³

As a school-sponsored student newspaper—all expenses, office space, equipment and the faculty adviser were paid for by the school district—the newspaper could reasonably bear the imprimatur of the school and be viewed as speech construed by the school.²⁰⁴ “Under

196. 645 F.3d 533, 536 (2d Cir. 2011).

197. *Id.* at 535-43; *see generally* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Morse v. Frederick*, 551 U.S. 393 (2007).

198. *R.O.*, 645 F.3d at 540-41.

199. *Id.* at 541.

200. *Id.* at 541-43.

201. *Id.* at 539-40.

202. *Id.* at 541.

203. *R.O.*, 645 F.3d at 540.

204. *Id.* at 541.

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Hazelwood, school-sponsored speech may be censored ‘so long as the censorship is reasonably related to legitimate pedagogical concerns,’” the court wrote.²⁰⁵

205. *Id.* at 542 (quoting *Guiles v. Marineau*, 461 F.3d 320, 325 (2d Cir. 2006)).