

MEDIA LAW

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INTRODUCTION

This year's media law *Survey* covers defamation, invasion of privacy, and intellectual property disputes involving media ranging from newspapers, magazines and book publishers to websites and internet-based operations. Cases cover high-profile litigants linked to the late, tabloid star Anna Nicole Smith, radio personalities, and a host of parties involved in newsworthy and public affairs. Cases also involve allegations of criminal activity, sex tapes, copyright infringement, and even whether offensive language can be broadcast on television.

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I. DEFAMATION—ELEMENTS

The tort of defamation, always a major area of concern for members of the media, was not the subject of any relevant decisions by the Court of Appeals this *Survey* year. One case from last year's *Survey*, *Copp v. Ramirez*, had a motion for leave to appeal denied by the state's high court.¹

Perhaps the highest-profile libel case of the year involved the late, controversial tabloid and reality television star Anna Nicole Smith whose stardom lived on in the federal courts in an extensive libel suit in *Stern v. Cosby*.² Here, Smith's former attorney and companion Howard K. Stern brought a multi-count claim seeking millions in damages, alleging he was libeled by Rita Cosby's best-selling 2007 book *Blonde Ambition: The Untold Story Behind Anna Nicole Smith's Death*.³

The case raised interesting questions about whether imputing homosexuality constitutes libel per se, whether a reality television star who exhibits bizarre behavior qualifies as a libel-proof plaintiff, and what journalistic behavior rises to the level of actual malice.⁴

Stern claimed he was libeled in nineteen passages in the book and that both Cosby, an experienced television news reporter, and the publisher, Hachette Book Group USA, were responsible for damage and harm he suffered from publication of purportedly false statements.⁵ Both defendants filed for summary judgment, with the court methodically analyzing the issues before partially granting Cosby summary judgment on some counts.⁶ The publisher was dismissed from the case altogether.⁷

In mounting her defense, Cosby first argued that Stern, who appeared in numerous episodes of the reality television show *The Anna Nicole Smith Show*, where he sometimes behaved oddly or at the very least was depicted in a negative light, made him "libel-proof."⁸ The concept of a libel-proof plaintiff rests on the premise that a plaintiff's reputation is already so "badly tarnished" that it cannot be harmed any

1. 12 N.Y.3d 711, 711, 909 N.E.2d 1235, 1235, 882 N.Y.S.2d 397, 397 (2009). The appellate division's dismissal of this case was addressed in last year's *Survey*. See 62 A.D.3d 23, 32, 874 N.Y.S.2d 52, 60 (1st Dep't 2009); see also Roy S. Gutterman, *Media Law, 2008-09 Survey of New York Law*, 60 SYRACUSE L. REV. 1041, 1048-49 (2010).

2. 645 F. Supp. 2d 258 (S.D.N.Y. 2009).

3. *Id.* at 263.

4. *Id.* at 264.

5. *Id.* at 263, 267.

6. *Id.* at 264.

7. *Stern*, 645 F. Supp. 2d at 284.

8. *Id.* at 269-70, 271.

further.⁹ Though it is a question of law, the court noted that the defense has been applied sparingly in the circuit.¹⁰ Thus, the court held that appearing on a reality television show, even one with salacious, tabloid, and “staged” content does not render a potential plaintiff libel-proof.¹¹

The weightier portion of the opinion focused on whether imputing homosexuality could constitute libel per se as well as the elements of the tort as defined and applied under New York law.¹² Libel per se requires proof of five elements: 1) a written defamatory statement of fact; 2) published by the defendant; 3) with a degree of fault as weighed by the plaintiff’s status as either a private or public figure; 4) falsity; and 5) harm or injury to the plaintiff.¹³ The court also reprised an oft-cited case of *Kimmerle v. New York Evening Journal, Inc.* to further explain the effect of a defamatory statement or words that “tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace.”¹⁴

Further, the tort of libel per se must fall under one of four categories: 1) accusing plaintiff of a serious crime; 2) injuring plaintiff’s reputation with regard to his/her business, trade or profession; 3) accusing plaintiff of having a loathsome disease; or 4) imputing unchastity of a woman.¹⁵

With the black letter law set up, the court then weighed whether imputing homosexuality in the 21st Century was susceptible of being libelous per se.¹⁶ Though the New York Court of Appeals has not ruled on this question, the district court applied precedent to predict how the state’s high court would rule.¹⁷ Because the United States Supreme Court has de-criminalized homosexual conduct,¹⁸ and a number of states have developed some level of legal recognition of same-sex relationships, imputing homosexuality cannot constitute libel per se.¹⁹ “Thus, I hold that [the statements imputing homosexuality] are not

9. *Id.* at 270 (quoting *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 303 (2d Cir. 1986)).

10. *Id.* at 270.

11. *Id.* at 271.

12. *Stern*, 645 F. Supp. 2d at 271-76.

13. *Id.* at 272 (quoting *Meloff v. N.Y. Life Ins. Co.*, 240 F.3d 138, 145 (2d Cir. 2001)).

14. 262 N.Y. 99, 102, 186 N.E. 217, 218 (1933) (citing *Sydney v. MacFadden* 242 N.Y. 208, 209, 51 N.E. 209, 210 (1926)).

15. *Stern*, 645 F. Supp. 2d at 273.

16. *Id.* at 274.

17. *Id.* at 274-75.

18. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003).

19. *Stern*, 645 F. Supp. 2d at 274, 275.

defamatory per se merely because they impute homosexuality to Stern. They are, however, nonetheless susceptible to a defamatory meaning. Therefore, a jury will decide whether they are defamatory,” the court wrote.²⁰

“A reasonable jury could find that engaging in oral sex at a party is shameful or contemptible, and the fact that this conduct may not be illegal does not alter this conclusion,” the court wrote.²¹ Thus, with regard to these two statements, plaintiff will have to prove special damages to a jury.²²

The truth of two other statements regarding allegations that plaintiff perjured himself in prior court proceedings required the court to assess the precision of the language used in the book.²³ Though truth is an absolute defense, the United States Supreme Court has held that only the “gist or sting” of the statement must be true to avoid liability.²⁴ “His statement in the proceeding was, if technically correct, nonetheless misleading. No reasonable jury could conclude otherwise. Accordingly, Statement 6 is substantially true, and therefore not actionable,” the court wrote.²⁵

Another important element the court wrestled with was whether the statements were published with actual malice, the standard of proof required for public figures.²⁶ Actual malice, which emerged from the landmark United States Supreme Court case, *New York Times Co. v. Sullivan*,²⁷ means that a public figure or public official plaintiff must prove that the statements were published either knowing they were false or with reckless disregard for the truth.²⁸ Actual malice differs from common law malice—ill will or animosity—and can be ascertained through several factors including fabrication or basis on unverified, anonymous sources; whether the allegations are so inherently improbable that only a reckless person would have published them; whether there are obvious reasons to doubt the truthfulness of the source

20. *Id.* at 275.

21. *Id.*

22. *Id.* at 276.

23. *Id.* at 276, 277.

24. *Stern*, 645 F. Supp. 2d. at 276 (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (citations omitted)).

25. *Id.* at 277.

26. *Id.* at 278.

27. *See generally* 376 U.S. 254 (1964).

28. *Stern*, 645 F. Supp. 2d. at 277-78 (quoting *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 174 (2d Cir. 2001) (citations omitted)).

or the accuracy of the source.²⁹

Ultimately, the court threw out eight of plaintiff's counts while allowing eleven to go to a jury to determine whether they were published with actual malice and have defamatory impact.³⁰ Whether plaintiff can recover punitive damages, which are awarded to punish outrageous, malicious, wanton, reckless or willful conduct, was also open for jury consideration, the court held.³¹ There might be sufficient evidence that "Cosby acted with hatred, ill will, or spite to permit the claim to reach the jury. Cosby, for her part, will be able to provide the jury with evidence that she treated Stern fairly in the Book."³²

The publisher was also dismissed because "[t]he law is clear . . . that a book publisher has no independent duty to investigate an author's story unless the publisher has actual, subjective doubts as to the accuracy of the story."³³ Shortly after the ruling, plaintiff dropped his lawsuit.³⁴

In *Michtavi v. New York Daily News*, the Second Circuit affirmed the dismissal of a convicted drug dealer's defamation and intentional infliction of emotional distress suit.³⁵ The district court ruled that the newspaper's accounts naming plaintiff as a "key lieutenant" to an organized crime figure who became a government informant was not defamatory.³⁶ "Under New York law, a statement is defamatory only if it would expose an individual to shame 'in the minds of right-thinking persons.' It is becoming increasingly hard to ascertain as a matter of law what a right-thinking person would think," the court wrote, noting that a prison community is not the intended population for comparison purposes.³⁷

In state court, a magazine article in which parties denied the existence of a sex tape was not construed to have defamatory import in *Smigo v. NYP Holdings, Inc.*³⁸ Plaintiff, the fiancé of a New York talk radio personality, argued that articles in *The New York Post* and

29. *Id.* at 278.

30. *Id.* at 284.

31. *Id.* at 286.

32. *Id.*

33. *Stern*, 645 F. Supp. 2d at 284.

34. On November 20, 2009, the parties stipulated to and filed a signed Dismissal with Prejudice. See also Bruce Golding, *Anna Lawyer Settles Gay Suit*, N.Y. POST, Nov. 21, 2009, at 7; Ben Chapman et al., *NY Minute*, N.Y. DAILY NEWS, Nov. 21, 2009, at 12.

35. See 587 F.3d 551, 552 (2d Cir. 2009).

36. *Id.* at 552.

37. *Id.*

38. No. 108756/08, 2010 NY Slip Op. 30556(U), at 9 (Sup. Ct. N.Y. Cnty. 2010).

Steppin' Out magazine were libel per se, imputing unchastity of a woman, exposing her to shame in the public.³⁹

The court wrote:

There is no evidence that moving defendants acted in an irresponsible manner or without due consideration to standards of information gathering. Nor did the article . . . impute unchastity to Smigo; rather, that article specifically stated that there was no truth to the allegation that a sex tape involving Smigo existed.⁴⁰

Claims for commercial appropriation were also unavailing because of the newsworthiness of the information.⁴¹ The claim for intentional infliction of emotional distress also failed because plaintiff could not offer proof that the publication was “extreme and outrageous.”⁴²

II. DEFAMATION—OF AND CONCERNING/GROUP LIBEL

Newspaper editorials critical of the St. Regis Mohawk Tribe's Tribal Council were not actionable, the appellate division affirmed based on both the group libel doctrine and the press's right to criticize on public affairs.⁴³ The court agreed with the lower court that “the offending statements were directed against a governing body and how it governed, rather than against its individual members; there were no statements that the Tribal Council members were individually corrupt or individually promoting a criminal enterprise.”⁴⁴

The case of drug lord Frank Lucas, which was the basis for the film, *American Gangster*, was again the backdrop for a defamation lawsuit in *Haefner v. New York Media, L.L.C.*⁴⁵ The film was the subject of a similar set of claims which were rejected by a federal court⁴⁶ and affirmed by the Second Circuit in 2009.⁴⁷

39. *Id.* at 4-8.

40. *Id.* at 8.

41. *Id.* at 11.

42. *Id.* at 9-10. The tort of intentional infliction of emotional distress has a four-prong requirement: 1) extreme and outrageous conduct; 2) intended to cause or disregard substantial probability of causing, severe emotional distress; 3) with a causal connection between the conduct and harm; 4) with severe emotional distress. *Smigo*, 2010 NY Slip Op. 30556(U) at 9-10 (quoting *Howell v. N.Y. Post Co., Inc.*, 81 N.Y.2d 115, 121, 612 N.E.2d 699, 702, 596 N.Y.S.2d 350, 353 (1993)).

43. *Lazore v. NYP Holdings, Inc.*, 61 A.D.3d 440, 440, 876 N.Y.S.2d 59, 60 (1st Dep't 2009).

44. *Id.*

45. No. 150189/08, 2009 N.Y. Misc. LEXIS 3641, at *4 (Sup. Ct. N.Y. Cnty. Oct. 15, 2009).

46. *See Diaz v. NBC Universal, Inc.*, 536 F. Supp. 2d 337 (S.D.N.Y. 2008).

47. *Diaz v. NBC Universal, Inc.*, 337 F. App'x 94 (2d Cir. 2009).

Here, plaintiffs were a retired New York City police officer and a retired Drug Enforcement Administration agent who claimed articles in *New York Magazine*, their republication on the magazine's website the film, and a book and the Kindle version of the book libeled them by alleging that they stole drug dealers' money during a police raid.⁴⁸

The initial article was published in 2000 in *New York Magazine*.⁴⁹ Even though the magazine changed ownership and it posted articles online, the court held that there was no republication and the statute of limitations barred the libel action.⁵⁰ Similarly, the 2007 articles were not considered new publication.⁵¹ A new publication or republication for a new audience would trigger a new statute of limitations.⁵²

The court's discussion of whether the Kindle publication of the book constitutes a new publication brought a new application to the rule: "Although there does not appear to be any governing caselaw regarding digital 'Kindle Editions' of books, . . . such editions should be treated as merely 'a delayed circulation of the original edition,' rather than as a republication thereof."⁵³

The group libel doctrine, which requires that a defamatory statement be about or "of and concerning" the plaintiff also barred the lawsuit, the court held.⁵⁴ The court followed the Second Circuit's rationale that because of the size of the group, plaintiffs could not establish that the statements were "about" them, thus the potentially defamatory content does not even need to be addressed.⁵⁵ Furthermore, the procedural doctrine of res judicata also barred the claims here.⁵⁶

III. DEFAMATION—PUBLIC/PRIVATE FIGURE/ACTUAL MALICE

A former assistant school superintendent involved in a controversial public corruption and embezzlement scandal on Long Island was deemed a public official and would have to prove that she

48. *Haefner*, 2009 N.Y. Misc. LEXIS 3641, at *1-5.

49. *Id.* at *2.

50. *Id.* at *2, 13.

51. *Id.* at *14.

52. *Id.* at *11 (quoting *Firth v. State*, 98 N.Y.2d 365, 371, 775 N.E.2d 463, 466, 747 N.Y.S.2d 69, 72 (2002)).

53. *Haefner*, 2009 N.Y. Misc. LEXIS, at *11. *See also Firth*, 98 N.Y.2d at 365, 775 N.E.2d at 463, 747 N.Y.S.2d at 69.

54. *Haefner*, 2009 N.Y. Misc. LEXIS, at *14-15.

55. *Id.* at *15-16 (quoting *Diaz v. NBC Universal, Inc.*, 536 F. Supp. 2d 337 (S.D.N.Y. 2008)).

56. *Id.* at *7.

was libeled with actual malice in *Silverman v. Newsday, Inc.*⁵⁷

On her status as a plaintiff, the court wrote:

[P]laintiff was a government employee who had, or appeared to have had, substantial responsibility for or control over education in the Roslyn school district. The public would have had an independent interest in her qualifications and performance, beyond the general public interest in the qualifications and performance of all government employee [sic].⁵⁸

Because of the intense nature of the public interest in the case, plaintiff could have also been considered a limited purpose public figure.⁵⁹

Furthermore, despite a minor inaccuracy in the newspaper headline referring to several parties as convicted criminals, and a subsequent correction, the court granted the newspaper summary judgment because there was no proof that the statements were published with actual malice—known falsity or reckless disregard for the truth.⁶⁰ “On this record there is only evidence of negligence and a failure to investigate. However, negligence does not suffice and the failure to investigate the truth, standing alone, is not enough to prove actual malice, even if a prudent person would have investigated before publishing the statement,” the court wrote.⁶¹

IV. DEFAMATION—FAIR AND ACCURATE REPORT PRIVILEGE

Two separate appellate panels upheld dismissals on the fair and accurate report privilege under section 74 of the New York Civil Rights Law.

In *Cholowsky v. Civiletti*, newspaper articles describing plaintiff’s role in criminal activities, including bribery of a public official, were gleaned from a variety of sources including a federal court’s computerized docket system and previous newspaper articles.⁶² The privilege afforded under section 74 removes civil liability for publication of fair and accurate accounts of a judicial proceeding.⁶³ “In the instant case, the publications explicitly stated that they were describing the criminal proceedings. Therefore, Civil Rights Law § 74

57. No. 9540/08, 2010 NY Slip Op. 30959(U) (Sup. Ct. Nassau Cnty. 2010).

58. *Id.* at 8.

59. *Id.* at 9.

60. *Id.*

61. *Id.* (citation omitted).

62. 69 A.D.3d 110, 113, 887 N.Y.S.2d 592, 595 (2d Dep’t 2009).

63. N.Y. CIV. RIGHTS LAW § 74 (McKinney 2009).

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was applicable,” the court wrote, adding that how the reporter gathered the information, even from secondary sources, was “immaterial” as long as it was “substantially accurate.”⁶⁴

With regard to the plaintiff, the court found him to be a limited purpose public figure, thus triggering the actual malice rule.⁶⁵ The court also noted that the newspaper did not have an obligation to get plaintiff’s side of the story.⁶⁶ Plaintiff “thrust himself into the forefront of a public controversy by engaging in business activities which were a matter of public concern.”⁶⁷ Thus, if the articles were not privileged, plaintiff still would have had to prove the offending content was published with known falsity or reckless disregard for the truth.⁶⁸

Similarly, in *Saleh v. New York Post*, the court affirmed a motion to dismiss because the allegedly defamatory material was based on court documents from a separate defamation case.⁶⁹ Reiterating the public policy behind section 74, the court also discussed the level of accuracy required under the law and the application of the law to both the body of the text and the headline.

The court wrote:

Contrary to the plaintiff’s contention, the fact that the article omitted certain information that was contained in the complaint of the separate defamation action did not alter the substantially accurate character of the article. Moreover, the inaccuracies cited by the plaintiff were not so egregious as to remove the article from the protection of Civil Rights Law § 74.⁷⁰

A lower court also applied the section 74 privilege to a police department press release in *Boucher v. Times/Review Newspapers, Corp.*⁷¹ A police blotter account of an assault and arrest naming plaintiff was not deemed defamatory because it was based on information contained in a police department press release, and thus a fair and accurate report of government proceedings.⁷²

The court wrote:

64. *Cholowsky*, 69 A.D.3d at 115, 887 N.Y.S.2d at 596 (citation omitted).
65. *Id.*, 887 N.Y.S.2d at 597.
66. *Id.*, 887 N.Y.S.2d at 596.
67. *Id.* at 115-16, 887 N.Y.S.2d at 597 (citation omitted).
68. *Id.* at 116, 887 N.Y.S.2d at 597 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).
69. No. 9811/08, 2010 NY Slip Op. 8922, at 2-3 (2d Dep’t, 2010).
70. *Id.* (citation omitted).
71. 38 Media L. Rep. 2360 (Sup. Ct. Suffolk Cnty. 2010).
72. *Id.* at 2361-62.

[T]here was no reason to doubt the accuracy of the information provided in the police department's press release. Therefore, relying upon the information contained in that press release cannot be [sic] the basis for a claim of gross irresponsibility (malice) or common law libel even if the report later proves to be inaccurate.⁷³

V. DEFAMATION—OPINION

Allegations that a judge may have overseen a case in which he had a potential conflict of interest could constitute libel per se, even in a newspaper opinion column, a trial court ruled in *Martin v. Daily News, L.P.*⁷⁴ The newspaper and its columnist argued that the contentious statements published in both the newspaper and an online blog were privileged as a true and fair report of judicial proceedings as well as pure protected opinion.⁷⁵ The newspaper and its columnist, Errol Louis, filed a pre-answer motion to dismiss the case under Civil Practice Law and Rules (CPLR) 3211(a)(1) and (7).⁷⁶ A third defendant, a lawyer involved in the controversy, was dismissed from the case.⁷⁷

The opinion privilege affords a publisher significant protection from liability for defamation if the offensive statement cannot be proven true or false.⁷⁸ Imputation of criminal activity can be an exception to the privilege.⁷⁹ Under the frequently cited Court of Appeals case, *Mann v. Abel*, to ascertain whether a statement is protected under the opinion privilege, the court must determine: 1) whether the language has a precise, readily understood meaning; 2) whether the statements can be proven true or false; and 3) whether in the full context the reader would recognize the statement is an opinion.⁸⁰

In *Martin*, even though the offensive comments were clearly found in the newspaper's opinion section and blog, the court was not convinced that the allegations were protected.⁸¹ A reasonable reader would have concluded that the judge had a conflict, a statement imputing criminal activity.⁸² "Accordingly, this court cannot conclude as a matter of law that the Second Article is privileged as a protected . . .

73. *Id.* at 2362 (citation omitted).

74. No. 100053/08, 2009 NY Slip Op. 31603(U), at 14-16 (Sup. Ct. N.Y. Cnty. 2009).

75. *Id.* at 10-11.

76. *Id.* at 3.

77. *Id.* at 2, 3, 20-23.

78. *Id.* at 16.

79. *Martin*, 2009 NY Slip Op. 31603(U), at 16.

80. 10 N.Y.3d 271, 276, 885 N.E.2d 884, 886, 856 N.Y.S.2d 31, 33 (2008).

81. *Martin*, 2009 NY Slip Op. 31603(U), at 17.

82. *Id.*

opinion which cannot be the subject of an action for defamation,” the court wrote.⁸³ The court also balked at finding the articles privileged under section 74 as a fair and accurate report of a judicial proceeding.⁸⁴

Finally, the court analyzed whether the statements were published with actual malice, which had to be applied because the justice was clearly a public figure.⁸⁵

VI. DEFAMATION—JURISDICTION

Allegedly defamatory comments posted on a dog association’s website failed to establish minimum contacts to establish jurisdiction for a defamation suit in New York, the appellate division ruled.⁸⁶ Though some of the facts, particularly the interpersonal contacts between the parties might have satisfied the procedural elements for jurisdiction under the state’s long arm statute, CPLR 302(a)(1), New York has set an especially high bar for granting out-of-state plaintiffs a venue for defamation claims.⁸⁷ CPLR 302(a)(2) and (3) specifically exempt defamation from the panoply of causes of action.⁸⁸ “Although defendants’ contacts could support long-arm jurisdiction for causes of action other than defamation and the issue here is a close one, we are unpersuaded that extending jurisdiction on these facts would be consistent with this state’s narrow approach to long-arm jurisdiction in defamation cases,” the court wrote.⁸⁹ Following a line of recent precedent involving web-based operations, especially websites that include reviews or user content, the court reversed the lower court, and ultimately dismissed the case.⁹⁰

VII. DEFAMATION—MISCELLANEOUS

A. *Statute of Limitations*

New York’s one-year statute of limitations barred a defamation and invasion of privacy lawsuit against a magazine that published a

83. *Id.* at 18.

84. *Id.*

85. *Id.*

86. *SPCA of Upstate N.Y., Inc. v. Am. Working Collie Ass’n*, 74 A.D.3d 1464, 1466, 903 N.Y.S.2d 562, 565 (3d Dep’t 2010).

87. *See id.* at 1465, 903 N.Y.S.2d at 563-64.

88. N.Y. C.P.L.R. 302(a)(2), (3) (McKinney 2010).

89. *SPCA of Upstate N.Y.*, 74 A.D.3d at 1466, 903 N.Y.S.2d at 565.

90. *Id.* at 1466-67, 903 N.Y.S.2d at 565 (the court relied on *Best Van Lines, Inc. v. Walker*, 490 F.3d 239 (2d Cir. 2007)).

photograph of the plaintiff.⁹¹ In *Suss v. New York Media*, the appellate division held that plaintiff's April 30, 2008 lawsuit was filed one day too late because the magazine was distributed on newsstands on April 28 and 29, 2007.⁹² Defendant submitted ample evidence that the magazine hit the newsstands in New York City on April 27 and 29, 2007.⁹³

In the Eastern District, in *Lehman v. Fox Cable Networks, Inc.*, a doctor's defamation claim emanating from his inclusion in two reality television shows titled *Busted on the Job 2* and *Totally Embarrassed* raised interesting questions about the media's use of grand jury materials.⁹⁴ This case also shows the complexities of ownership and liabilities that broadcasters and production companies encounter when they purchase productions.⁹⁵ Defendant, Fox, broadcast the reality television show which included surveillance video of plaintiff, a doctor who had been tried and acquitted of insurance fraud.⁹⁶ Defendant broadcast the segments in 2007 and 2008.⁹⁷ They had initially been produced by another defendant, Termite Art Productions Documentaries, then owned by Erik Nelson, and licensed to Fox, which broadcast the segment in 1998.⁹⁸ Termite was subsequently purchased by Lions Gate Entertainment.⁹⁹

Plaintiff argued that his depiction in the show as a "bogus doctor" along with being grouped with a range of convicted criminals harmed his reputation and constituted libel per se and invasion of privacy.¹⁰⁰ The court granted Termite and its former owner summary judgment.¹⁰¹

The most novel issue in this case, however, involved invocation of Criminal Procedure Law subsections 190.25(3) and (4) and the accompanying criminal penalties for using surveillance video that was presented to a grand jury.¹⁰² A host of government, court personnel, and authorities involved in criminal proceedings have a duty to maintain

91. *Suss v. N.Y. Media, Inc.*, 69 A.D.3d 411, 411, 891 N.Y.S.2d 409, 410 (1st Dep't 2010).

92. *Id.* at 411-12, 891 N.Y.S.2d at 410.

93. *Id.*

94. No. 07-CV-2291, 2009 U.S. Dist. LEXIS 75500 (E.D.N.Y. Aug. 25, 2009).

95. *Id.* at *1.

96. *Id.* at *4-5.

97. *Id.* at *6.

98. *Id.* at *5.

99. *Lehman*, 2009 U.S. Dist. LEXIS 75500, at *5.

100. *Id.* at *6.

101. *Id.* at *18.

102. *Id.* at *11-12.

grand jury secrecy under the statute.¹⁰³ However, the court astutely recognized that members of the media are not part of that list.¹⁰⁴ In a footnote, the court wrote: “Therefore, it is irrelevant to the case at bar how the defendants obtained the alleged grand jury materials, as the statute imposes no duty of confidentiality upon them with regards to [the] publication of those materials.”¹⁰⁵

With regard to the statute of limitations, the court reiterated that the timing follows the initial publication dating back to 1998 for Termite, which was grounds for dismissing Termite from the case.¹⁰⁶ However, under the so-called single publication rule, if a new publication includes new material aimed at a new audience, the statute of limitations begins anew.¹⁰⁷

The court held:

Therefore, any defamation claims against Nelson and Termite arising from these two programs would necessarily had to have been commenced within one year of the 1998 and 2000 telecasts, respectively . . . [h]ere, plaintiff filed suit against all defendants in June 2007, long after the statute of limitations against Nelson and Termite had run.¹⁰⁸

B. Defamation—Discovery

A request for expanded international discovery to bolster a truth defense was denied in *Mitre Sports Int’l, Ltd. v. Home Box Office, Inc.*¹⁰⁹ A report about soccer ball production in India and Pakistan that aired on HBO’s sports magazine show *Real Sports with Bryant Gumbel* sparked a defamation claim.¹¹⁰ Mitre, a sports equipment manufacturer, objected to allegations in the report that it used underpaid and unpaid child labor in “inhumane working conditions” in India and Pakistan.¹¹¹ The report also alleged this was not a “world-wide” problem.¹¹²

The parties had already traveled to India for discovery and

103. *Id.*

104. *Lehman*, 2009 U.S. Dist. LEXIS 75500, at *13 (citing *Hays v. Marano*, 114 A.D.2d 387, 389, 493 N.Y.S.2d 904, 906 (2d Dep’t 1985)).

105. *Id.* at *14.

106. *Id.* at *17.

107. *Id.* at *15-16.

108. *Id.* at *17-18.

109. No. 08 Civ. 9117, 2010 U.S. Dist. LEXIS 37494, at *3 (S.D.N.Y. Apr. 15, 2010).

110. *Id.* at *2.

111. *Id.*

112. *Id.*

depositions, and HBO sought to engage in discovery in China.¹¹³ The court denied the request, citing cost and time as well as substantive questions about the substantial truth HBO averred.¹¹⁴

The court ruled:

There was no suggestion whatsoever that the conditions depicted in the segment were merely exemplary of a broader problem. Given that the segment focused exclusively on conditions in India and Pakistan, the nature of plaintiff's operations in China, if any, cannot render the segment's depictions of alleged conditions in India substantially true.¹¹⁵

Efforts to unmask anonymous online writers failed in two separate libel cases in pre-action discovery under CPLR 3102(c).¹¹⁶ The discovery rule assists a potential plaintiff in preserving information for litigation and identifying proper defendants.¹¹⁷

In *Sandals*, plaintiff sought to uncover the identity of someone who posted emails critical of the resort.¹¹⁸ To obtain the court order identifying the anonymous speaker or revealing the identity behind a user name, a potential plaintiff must establish a prima facie case of defamation.¹¹⁹

The emails in question here constituted pure opinion that did not assert an objective fact, the court held.¹²⁰ "As the email at issue does not contain assertions of objective fact with regard to Sandals, the email cannot form the predicate for a defamation claim Furthermore, as Sandals offers no evidence of the harm the account holder's email has caused it . . . ," the court wrote.¹²¹

C. Online Immunity

Although immunity under the Communications Decency Act section 230¹²² is federal law, a state court dismissed social networking

113. *Id.*

114. *Mitre*, 2010 U.S. Dist. LEXIS 37494, at *7-8.

115. *Id.* at *8.

116. *In re Sandals Resorts Int'l Ltd.*, No. 100628/10, 2010 NY Slip Op. 50606(U), at 3 (Sup. Ct. N.Y. Cnty. 2010); *In re Stewart*, No. 116669/09, 2009 NY Slip Op. 33163(U), at 1 (Sup. Ct. N.Y. Cnty. 2009).

117. *Sandals*, N.Y. Slip Op. 50606(U), at 2.

118. *Id.* at 1-2.

119. *Id.* at 2.

120. *Id.* at 3.

121. *Id.*

122. 47 U.S.C. § 230 (2006).

behemoth, Facebook, from a defamation case based on state law.¹²³ Section 230 provides immunity for interactive computer services that do not monitor, control, or edit content provided by third parties on their computer services.¹²⁴ Plaintiff in this case brought a defamation claim against Facebook and other defendants who posted allegedly defamatory statements with “negative sexual and medical connotations” about her.¹²⁵

The claims against the other defendants went forward, but the court wrote: “The allegations in the complaint establish that Facebook is entitled to the liability shield conferred by the Communications Decency Act and therefore the court shall dismiss this action against the movant as there is no claim Facebook had any hand in creating the content.”¹²⁶

D. SLAPP

Comments posted on a newspaper’s community blog spurred a defamation claim and then prompted a counterclaim based on New York’s Strategic Lawsuit Against Public Participation (SLAPP)¹²⁷ law in *Ottinger v. Tiekert*.¹²⁸ The dispute emanated from a controversial building permit dispute that generated considerable local interest in a Westchester County community.¹²⁹

The SLAPP law is aimed at protecting debate on public issues by allowing a cause of action in cases in which a defamation claim is intended to suppress speech through harassment or intimidation.¹³⁰ The court held:

Based on the foregoing, the [c]ourt finds that the within action, which action involves public petition and participation brought by a public applicant, and which action is materially related to the defendant’s efforts to comment on, challenge or oppose said application, is a

123. *Finkel v. Facebook, Inc.*, No. 102578/09, 2009 N.Y. Slip Op. 32248(U), at 1 (Sup. Ct. N.Y. Cnty., 2009).

124. 47 U.S.C. § 230(c)(1).

125. *Finkel*, 2009 N.Y. Slip Op. 32248(U), at 2.

126. *Id.* at 4.

127. N.Y. CIV. RIGHTS LAW § 76-a (McKinney 2009).

128. No. 16429/08, 2009 N.Y. Slip Op. 52043(U), at 2 (Sup. Ct. N.Y. Cnty. 2009). This follows an earlier published opinion in *Ottinger v. The Journal News*, in which the court ordered the newspaper to provide the identity anonymous posters on the paper’s website. No. 08-03892, 2008 N.Y. Misc. LEXIS 4579, at *7 (Sup. Ct. Westchester Cnty. 2008). This led to the identification of defendant, Tiekert.

129. *Ottinger*, 2009 N.Y. Slip Op. 52043(U), at 2.

130. *Id.* at 3-4.

SLAPP within the meaning of Civil Rights Law.¹³¹

The court, however, could not find proof that the underlying defamation case was brought with malice and Tiekert failed to prove he was entitled to either compensatory, punitive damages, or attorneys fees.¹³²

E. Newsgathering Issues

A reporter-source exchange of information with plaintiff's request that it be "embargoed" was not deemed to be a contract between the parties in *Aretakis v. Hearst Publications*.¹³³ Plaintiff, a lawyer involved in priest abuse litigation, gave a reporter for the *Albany Times Union* a tape of a mediation meeting, which he claimed she could not publish until he gave explicit permission, hence the so-called embargo.¹³⁴ Nevertheless, the reporter gathered information from other sources and sought comment from plaintiff who did not return her telephone call, and the paper published a story on the subject.¹³⁵

The court was unable to find a legal definition of "embargo" in terms of newsgathering and publication, or with relation to breach of contract, and it also refused to ascribe one.¹³⁶ Although exchanges of information between sources and reporters sometimes rise to contractual agreements, particularly with regard to confidentiality,¹³⁷ the court here did not find a valid contractual agreement based on offer and acceptance.¹³⁸ Furthermore, plaintiff's terms for the embargo were vague and his business ultimately grew from the publication, thus he suffered no damages.¹³⁹

VIII. INVASION OF PRIVACY AND OTHER TORTS

A. Invasion of Privacy

A raft of media defendants, both newspapers and television stations, were dismissed from a defamation and intentional infliction of emotional distress (IIED) case tied to a series of claims based on federal

131. *Id.*

132. *Id.* at 4.

133. No. 101982/05, 2009 N.Y. Slip Op. 51738(U), at 2 (Sup. Ct. N.Y. Cnty., 2009).

134. *Id.* at 1-2.

135. *Id.* at 2.

136. *Id.*

137. *See generally* Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

138. *Aretakis*, 2009 N.Y. Slip Op. 51738(U), at 3-4.

139. *Id.*

law including sections 1982, 1983, 1985, and 1986 in *Young v. Suffolk County*.¹⁴⁰ Government officials and plaintiff's estranged ex-husband allowed reporters into plaintiff's home to film deplorable and unsanitary living conditions.¹⁴¹ Plaintiff argued that without her consent, the presence in her house constituted an unwarranted "media ride-along" which invaded her privacy and caused damages based on the torts of defamation and IIED.¹⁴²

The state law causes of action were tacked onto the claims along with the constitutional and federal claims in the latest in a protracted marital dispute.¹⁴³

The court granted the media defendants' motion to dismiss under Federal Rules of Civil Procedure 12(b)(6) because plaintiff could not prove the media performed as state actors.¹⁴⁴ The court wrote:

Plaintiff's allegations regarding the alleged 'media ride along' are conclusory and do not suffice to save plaintiff's claim. Aside from using the conclusory phrase 'media ride along' repeatedly throughout the amended complaint, plaintiff alleges no facts to bolster the theory that there was such a ride along. Specifically, plaintiff offers no allegations that suggest that the media arrived in the same vehicles as the County defendants or that the media defendants even arrived at the same time as the County defendants.¹⁴⁵

There was no proof of a conspiracy or collusion between the reporters and the government and it appeared that that the reporters did nothing more than photograph and record observations on the property.¹⁴⁶

The court also barred the state law claims based on the torts' one-year statute of limitations.¹⁴⁷ Plaintiff attempted to circumvent the statute of limitations by arguing that the online availability of the news reports constituted new publications.¹⁴⁸ The court firmly applied the single publication rule, holding, "the fact that a story remains available online does not restart the statute of limitations."¹⁴⁹

In state court, a photograph used on a book cover was deemed a

140. 705 F. Supp. 2d 183, 207-09 (E.D.N.Y. 2010).

141. *Id.* at 189.

142. *Id.* at 191, 193.

143. *Id.* at 190, 193, 209.

144. *Id.* at 197, 202.

145. *Young*, 705 F. Supp. 2d at 200.

146. *Id.* at 201.

147. *Id.* at 211.

148. *Id.* at 212.

149. *Id.*

commercial use and an invasion of privacy in *Yasin v. Q-Boro Holdings, LLC*.¹⁵⁰ Here, plaintiff, a singer/songwriter, hired a photographer to take pictures for her own promotional materials.¹⁵¹ She did not sign a release.¹⁵² About three years later, her photograph appeared on the cover of a fiction book titled *Baby Doll*.¹⁵³

Commercial appropriation is the only element of the tort of invasion of privacy recognized in New York under Civil Rights Law sections 50 and 51.¹⁵⁴ While newsworthiness and coverage of matters of public interest, even satirical or incidental commercial uses, are privileged against the tort, the court found that the use of the photograph was purely commercial.¹⁵⁵

Not only did the court refuse to find the use newsworthy, it wrote that “the use of Yasin’s image on the front cover of defendants’ book is purely for marketing and trade purposes; solely as a means to attract customers and generate sales.”¹⁵⁶ In addition to this finding and summary judgment for plaintiff, the court granted plaintiff’s injunction prohibiting further use, display or sale of the plaintiff’s image or photograph.¹⁵⁷

B. Other Torts

The Second Circuit affirmed dismissal of a defamation and prima facie tort claim in a newspaper column about sexual abuse committed by a priest.¹⁵⁸ In *McKenzie v. Dow Jones & Co.*, the appellate panel agreed that not only had plaintiff’s time to file suit expired under New York’s one-year statute of limitations under CPLR 215(3), but his prima facie tort claim was nothing more than a thinly-veiled defamation claim.¹⁵⁹

The court wrote: “Whatever the statute of limitations for prima facie tort, however, McKenzie’s claim still fails. It is well-settled in New York that a plaintiff cannot save an untimely defamation claim by

150. No. 13259/09, 2010 NY Slip Op. 50742(U), at 2-3 (Sup. Ct. Kings Cnty. 2010).

151. *Id.* at 1.

152. *Id.*

153. *Id.*

154. *Id.* at 2.

155. *Yasin*, 2010 N.Y. Slip Op. 50742 (U), at 2.

156. *Id.* at 2.

157. *Id.*

158. *McKenzie v. Dow Jones & Co., Inc.*, 355 F. App’x 533, 535, 537 (2d Cir. 2009). For a more detailed discussion of the underlying case, see Roy S. Gutterman, *Media Law, 2007-08 Survey of New York Law*, 59 SYRACUSE L. REV. 953, 980-81 (2009).

159. *McKenzie*, 355 F. App’x at 535.

fashioning the claim under some other rubric, thereby to avail himself of a longer limitations period.”¹⁶⁰

New York law is not receptive to plaintiffs cloaking defamation claims in the prima facie tort.¹⁶¹ The tort requires a strong degree of intentional and malicious action by a defendant, which fails to come remotely close to defendant’s publication of a column on a serious matter of public interest.¹⁶²

The invasion of privacy claim, also time-barred, was also a misapplication of the law in New York, which only recognizes the tort in cases of commercial appropriation, not common law invasion of privacy such as publication of private and embarrassing facts.¹⁶³

IX. COPYRIGHT AND TRADEMARK

The hot topic of “hot news” misappropriation was the subject of significant discussion again in the Southern District, this year in *Barclays Capital Inc. v. Theflyonthewall.com*.¹⁶⁴ Like last year’s *Associated Press v. All Headline News Corp.*, this case involved an online news entity that used another entity’s intellectual property without its consent.¹⁶⁵

Here, a group of financial information service providers sued Theflyonthewall.com (“the Fly”), an online financial news aggregator, for both copyright infringement and hot news misappropriation.¹⁶⁶

This case was subject of a reported opinion following a bench trial, a permanent injunction, and a challenge to that injunction by the defendant.¹⁶⁷

In ruling on the challenge to the injunction and defendant’s motion for a stay in the injunction, the court applied the controlling precedent on the hot news doctrine under *National Basketball Ass’n v. Motorola, Inc.*¹⁶⁸ The NBA case applied a five-prong analysis: 1) plaintiff must

160. *Id.*

161. *Id.*

162. *Id.* at 536. Furthermore, the prima facie tort, with a three-year statute of limitations, requires proof of four elements under New York law: 1) intentional infliction of harm; 2) motivated with malice without excuse or justification; 3) resulting in special damages; 4) by an act that would otherwise be lawful. *Id.* at 536 (quoting *United States v. Merritt Meridian Constr. Corp.*, 95 F.3d 153, 161 (2d Cir. 1996)).

163. *McKenzie*, 355 F. App’x at 537.

164. 700 F. Supp. 2d 310, 313 (S.D.N.Y. 2010).

165. *See* 608 F. Supp. 2d 454 (S.D.N.Y. 2009).

166. *Barclays*, 700 F. Supp. 2d at 348.

167. *Id.*

168. 105 F.3d 841 (2d Cir. 1997).

generate or gather information at a cost; 2) the data or information is time-sensitive; 3) defendant's use constitutes "free riding" on plaintiff's work; 4) defendant is in direct competition with a product or service offered by plaintiff; 5) the free riding reduces the incentive to produce the service or product or its quality is substantially threatened.¹⁶⁹

The Fly was also mounting an appeal to the Second Circuit.¹⁷⁰

In addition to questioning the Fly's arguments on all five points, the court challenged the Fly's First Amendment argument, which was not raised in its pleadings or during the trial.¹⁷¹ There is a substantial body of law pertaining to injunctions aimed at First Amendment-related activities, which includes a heavy presumption of unconstitutionality because of the risk for censorship or prior restraints.¹⁷² In addition to the procedural and factual deficiencies with the Fly's constitutional argument, the court noted that the government has a "substantial" government interest in preventing unfair competition, especially when intellectual property is concerned.¹⁷³

The court wrote:

It is important to note at the outset that, unlike in the context of a preliminary injunction, no restraint was placed on Fly's speech until after Fly was given a full and fair opportunity to present its defenses at trial. As significantly, if Fly were truly concerned about potential encroachment upon its *First Amendment* rights and believed that the injunction that the Firms sought would constitute "irreparable harm," it could have made that argument at trial. Instead, Fly expressly disclaimed it.¹⁷⁴

After its analysis, the court totally rejected the Fly's arguments, dismissing them as "entirely without merit."¹⁷⁵

The Digital Millennium Copyright Act (DMCA)¹⁷⁶ was the central issue in both a Second Circuit and Southern District opinion.

In *Tiffany Inc. v. eBay Inc.*, the Second Circuit affirmed dismissal of a contributory infringement claim against the giant internet-based auction site.¹⁷⁷

169. *Id.* at 845.

170. *Barclays*, 700 F. Supp. 2d at 348.

171. *Id.* at 349.

172. *Id.* at 352-53.

173. *Id.* at 354.

174. *Id.*

175. *Barclays*, 700 F. Supp. 2d at 355.

176. 17 U.S.C. § 512(c) (2006).

177. 600 F.3d 93 (2d Cir. 2010).

Whether the giant internet video site YouTube qualified for the safe harbor provisions of the DMCA, was the central issue in *Viacom International, Inc. v. YouTube, Inc.*¹⁷⁸ Both sides filed motions for summary judgment in this widely-observed case.¹⁷⁹ The bulk of the court's opinion traced the origins of the DMCA, with particular attention devoted to analyzing the statute's legislative history.¹⁸⁰

The court noted that YouTube, owned by Google, absorbs twenty-four hours of new video every minute.¹⁸¹ Plaintiffs argued that significant amounts of its protected intellectual property were part of the vast quantity of uploaded video and that YouTube knew about it.¹⁸² The safe harbor provisions provide defendants with some level of immunity if they are notified of a potential infringement and they take down the offending content.¹⁸³

The court wrote: "Indeed, the present case shows that the DMCA notification regime works efficiently: when Viacom over a period of months accumulated some 100,000 videos and then sent one mass take-down notice on February 2, 2007, by the next business day, YouTube had removed virtually all of them."¹⁸⁴

In a more traditional copyright dispute, a ghostwriter's fraudulent inducement lawsuit was properly dismissed as preempted by the federal Copyright Act, the Second Circuit affirmed in *Miller v. Holtzbrinck Publishers, Inc.*¹⁸⁵ The Southern District rejected plaintiff's amended claims for fraudulent inducement, asserting that her claim was more appropriate under breach of contract principles, which would also fail under the statute of frauds.¹⁸⁶ Earlier, the court rejected plaintiff's claims for tortious interference and conversion, which were preempted by the Copyright Act.¹⁸⁷

Plaintiff had an agreement to ghostwrite the memoir of Heather Hunter, one of the defendants who was purported to be a groundbreaking adult film star.¹⁸⁸ There was an agreement for compensation

178. 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

179. *Id.* at 516.

180. *Id.* at 516-23.

181. *Id.* at 518.

182. *Id.* at 516.

183. *Viacom Int'l*, 718 F. Supp. 2d at 523.

184. *Id.* at 524.

185. 377 F. App'x 72 (2d Cir. 2010).

186. *See* No. 08 Civ. 3508, 2009 U.S. Dist. LEXIS 18973 (S.D.N.Y. Mar. 3, 2009).

187. *See* No. 08 Civ. 3508, 2008 U.S. Dist. LEXIS 92038 (S.D.N.Y. Nov. 11, 2008).

188. *Miller*, 377 F. App'x at 73; 2009 U.S. Dist. LEXIS 18973, at * 2.

and credit, however, it was not preserved in writing.¹⁸⁹ After she produced a manuscript, defendants published a similar book and never paid or credited plaintiff.¹⁹⁰

The Second Circuit, ruling on the tortious interference and conversion claims against third parties, held that the Copyright Act preempted such state causes of action.¹⁹¹

The court wrote:

The Copyright Act preempts a state law claim when: “(1) the particular work to which the claim is being applied falls within the type of works protected by the Copyright Act; and (2) the claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law.”¹⁹²

The exception to the preemption doctrine allows a plaintiff to employ a state claim only when the claim is “qualitatively different” from a copyright infringement, which plaintiff also failed to do.¹⁹³

The Second Circuit also ruled on whether a federal court in New York State was the proper place to hear an intellectual property infringement suit in the internet age.

The Second Circuit certified the question to the Court of Appeals in *Penguin Group (USA) Inc. v. American Buddha*.¹⁹⁴ Penguin challenged dismissal of its copyright infringement case for failure to state a claim based on whether New York federal courts had the appropriate jurisdiction.¹⁹⁵ Penguin brought the action based on the Copyright Act, charging that the Oregon-based non-profit had illegally uploaded four of its books to a website which allowed members to download the books for free.¹⁹⁶

Because the Copyright Act does not have a jurisdictional requirement, the federal courts look to traditional state civil procedural elements, particularly the state’s long-arm statute, CPLR 302.¹⁹⁷ The key question was whether the jurisdiction should be granted at the home state of the plaintiff company’s headquarters and whether that is where the harm occurred or whether the case is better situated where the tort

189. *Miller*, 2009 U.S. Dist. LEXIS 18973, at *3.

190. *Id.*

191. *Miller*, 377 F. App’x at 73.

192. *Id.* at 73 (quoting *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296 (2d Cir. 2004)).

193. *Id.*

194. 609 F.3d 30 (2d Cir. 2010).

195. *Id.* at 31-32.

196. *Id.* at 33.

197. *Id.* at 32.

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occurred, Arizona or Oregon, the home of defendant and its computers.¹⁹⁸

There are five elements under CPLR 302 for jurisdiction: 1) tortious action committed outside New York; 2) cause of action arose from that act; 3) the act causes injury to a person or property in New York; 4) the defendant expected or should have reasonably expected that the action would have consequences in New York; and 5) defendant derives substantial revenue from interstate or international commerce.¹⁹⁹

The district court here held that personal jurisdiction failed because there was insufficient proof of both tortious action and injury suffered in New York.²⁰⁰ The question of “where” the proper situs is for an intellectual property dispute with traditional media is a question of disparate and conflicting answers, and is further complicated by the cyberspace elements at issue in this case, the court noted.²⁰¹

The court summarized:

Neither the New York Court of Appeals nor this Circuit has decided what the situs of the injury is in an intellectual property case. District courts in this Circuit that have addressed the question have reached disparate results, some concluding that the injury occurs where the plaintiff experiences the loss; some concluding that it depends where the infringed property is held, apparently assuming that the property is held at its owners residence or principal place of business; and some concluding that the injury occurs where the infringing conduct took place.²⁰²

In the Southern District, similarities between two cookbooks in topic, theme, and organization did not constitute copyright infringement in the highly-publicized dispute between a chef/author and Jessica Seinfeld, the wife of well-known comedian Jerry Seinfeld.²⁰³ The “overlapping” similarities focused on pureeing healthy foods to hide in children’s foods were considered “stock elements” and not sufficient enough to stake a claim, the court held.²⁰⁴ The court also rejected a host of other claims including trademark infringement,²⁰⁵ unfair

198. *Id.* at 34-35.

199. *Penguin Grp.*, 609 F.3d. at 35.

200. *Id.* at 34.

201. *Id.* at 36 n.4.

202. *Id.* at 36.

203. *Lapine v. Seinfeld*, No. 08 Civ. 128, 2009 U.S. Dist. LEXIS 82304 (S.D.N.Y. 2009).

204. *Id.* at *23-25.

205. *Id.* at *37-42.

competition,²⁰⁶ and defamation.²⁰⁷

X. BROADCAST INDECENCY

The Second Circuit made a second ruling on the high-profile *Fox Television v. FCC* case this term, this time ruling on the constitutionality of the Commission's rules on indecency.²⁰⁸ The court had previously ruled on the applicability of the Administrative Procedure Act²⁰⁹ before the United States Supreme Court heard arguments and remanded the case.²¹⁰ At issue in this case was whether the commission's rules on the broadcast of so-called "fleeting expletives" violated the First Amendment.²¹¹

Central to the court's analysis was the modern relevance and application of the leading precedent on broadcast indecency, *FCC v. Pacifica*,²¹² which was decided in 1978 before the explosion of cable television, satellite entertainment services, the Internet, and a range of technological parental control mechanisms.²¹³

The FCC's 2001 Industry Guidance rule—intended to indicate what constituted indecency—raised questions of vagueness, the court ruled.²¹⁴ Then, a determination of indecency required: a finding whether the material describes or depicts sexual or excretory organs or activities and whether the broadcast is "patently offensive as measured by contemporary community standards"²¹⁵ Further, determining the patently offensive nature requires an additional three-prong analysis weighing: 1) the explicitness or graphic nature of the description or depiction; 2) whether the content dwells on or repeats at length the descriptions or depictions; and 3) whether the content "panders or is used to titillate" or is used for "shock value."²¹⁶

206. *Id.* at *42-47.

207. *Id.* at *47-49.

208. *Fox Television Stations v. Fed. Comm'n's Comm'n*, 613 F.3d 317 (2d Cir. 2010).

209. *See* 489 F.3d 444 (2d Cir. 2007). For a more comprehensive review of the underlying facts of this case see Roy S. Gutterman, *Media Law, 2006-07 Survey of New York Law*, 58 SYRACUSE L. REV. 1075, 1095-97 (2008).

210. *See* *Fed. Comm'n's Comm'n v. Fox Television Stations*, 129 S. Ct. 1800 (2009).

211. *Fox Television Stations*, 613 F.3d at 319, 324.

212. 438 U.S. 726 (1978).

213. *Fox Television Stations*, 613 F.3d at 326.

214. *Id.* at 330.

215. *Id.* (quoting *In re* Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency, 16 FCC Rcd. 7999, 8002 (2001)).

216. *Id.*

These rules and their application raised questions of unconstitutional vagueness, the court ruled.²¹⁷ Playing on some of the tamer language in the underlying dispute, the court showed how a broadcaster could be challenged:

The Commission argues that its three-factor ‘patently offensive’ test gives broadcasters fair notice of what it will find indecent. However, in each of these cases, the Commission’s reasoning consisted of repetition of one or more of the factors without any discussion of how it applied them. Thus, the word ‘bullshit’ is indecent because it is ‘vulgar, graphic and explicit’ while the words [sic] ‘dickhead’ was not indecent because it was ‘not sufficiently vulgar, explicit, or graphic.’ This hardly gives broadcasters notice of how the Commission will apply the factors in the future.²¹⁸

The court noted the FCC policy did have some flexibility, particularly for exceptions for bona fide news and artistic expression.²¹⁹ But the policy still raised First Amendment concerns because of questions of clarity and application.²²⁰ The court noted:

With the FCC’s indiscernible standards come the risk that such standards will be enforced in a discriminatory manner. The vagueness doctrine is intended, in part, to avoid that risk. If government officials are permitted to make decisions on an “ad hoc” basis, there is a risk that those decisions will reflect the official’s subjective biases.²²¹

Even though the court did not impute that the FCC had nefarious intent to censor speech or content, the risk of a chilling effect on speech and self-censorship was an overwhelming concern.²²² The self-censorship concern popped up in both entertainment—the film *Saving Private Ryan* and a documentary, *The Blues*—as well as in news and even public affairs programming.²²³

The court surmised:

As these examples illustrate, the absence of reliable guidance in the FCC’s standards chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature. Sex and the magnetic power of sexual attraction are surely among the most predominant themes in the study of humanity since the Trojan War. The digestive system and excretion are also important areas of

217. *Id.* at 330.

218. *Fox Television Stations*, 613 F.3d at 326.

219. *Id.* at 332.

220. *Id.*

221. *Id.*

222. *Id.* at 333-34.

223. *Fox Television Stations*, 613 F.3d at 333-34, 335.

human attention. By prohibiting all “patently offensive” references to sex, sexual organs, and excretion without giving adequate guidance as to what “patently offensive” means, the FCC effectively chills speech, because broadcasters have no way of knowing what the FCC will find offensive. To place any discussion of these vast topics at the broadcaster’s peril has the effect of promoting wide self-censorship of valuable material which should be completely protected under the First Amendment.²²⁴

224. *Id.* at 335.