

MEDIA LAW

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INTRODUCTION

This year’s *Survey* discusses a range of cases involving media defendants—newspapers, online publishers, writers, entertainers, and others. Research uncovered numerous high profile and “interesting” cases, many with implications on First Amendment rights.

I. DEFAMATION—ELEMENTS

In *Lenz v. Young*, the Second Circuit affirmed the dismissal of a defamation claim for published comments that could not satisfy the

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tort's falsity requirement.¹ Articles published in the newspaper *New York Newsday*, as well as the *Maryland Daily Record*, detailing plaintiffs' roles in a corruption scandal and two previous lawsuits, were deemed protected opinion.² One published statement quoted a lawyer involved in the underlying litigation that was the subject of newspaper accounts, saying plaintiffs "concealed" a deal from the State.³ The second article called the plaintiffs part of a "triumvirate" that could not be considered defamatory by a reasonable reader.⁴

Applying well-established state law on defamation, the court noted that "falsity is a necessary element of a defamation cause of action and only facts are capable of being proven false."⁵ "A reasonable reader would find the complained-of statements to be opinion, not fact," the court wrote.⁶ The use of quotation marks around the word "concealed," did not add a defamatory connotation, the court wrote.⁷ The court concluded that it would not "strain to find defamatory interpretations where none exists."⁸

An article published on a website that could injure a plaintiff's reputation in his trade, business, or profession could be defamatory per se, the Second Circuit affirmed in *Robertson v. Dowbenko*.⁹ The article in question emanated from a television interview of the plaintiff, but with the addition of statements "he never made" and misrepresentations and distortions, which the plaintiff argued created falsity.¹⁰ Though both the district court and Second Circuit make references to the allegedly defamatory statements, neither opinion explicitly details the actual defamatory allegations because the courts ruled against the defendant as a default, for noncompliance with discovery.¹¹ Because the claim was for defamation per se, \$1,000 in general damages were awarded as were \$37,129 in special damages.¹²

1. No. 11-2255-cv, 2012 U.S. App. LEXIS 12636, at *5 (2d Cir. June 21, 2012).

2. *Id.* at *1-3.

3. *Id.* at *2.

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

5. *Id.* at *3 (quoting *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 153, 623 N.E.2d 1163, 1167, 603 N.Y.S.2d 813, 817 (1993)).

6. *Lenz*, 2012 U.S. App. LEXIS 12636, at *4.

7. *Id.*

8. *Id.* at *5 (quoting *Cohn v. Nat'l Broad. Co.*, 50 N.Y.2d 885, 887, 408 N.E.2d 672, 673, 430 N.Y.S.2d 265, 266 (1980)).

9. 443 F. App'x 659, 662 (2d Cir. 2011).

10. *Robertson v. Dowbenko*, 2008 U.S. Dist. LEXIS 47860, at *1 (S.D.N.Y. June 17, 2008).

11. *Robertson*, 443 F. App'x at 662; *Robertson*, 2008 U.S. Dist. LEXIS 47860, at *22.

12. *Robertson*, 443 F. App'x at 661.

Online news coverage accusing a Brooklyn-based Nigerian lawyer and part-time pastor of questionable and corrupt business practices generated a complicated factual complaint based on defamation, invasion of privacy, and intentional and negligent infliction of emotional distress claims in *Abakporo v. Sahara Reporters*.¹³ The accusations published on defendant's news website, focusing on international news involving Nigeria, were based on original reporting on a dispute involving the plaintiff, a petition alleging public corruption of both the plaintiff and Nigerian government officials at the United Nations, and excerpts from a 2008 *New York Daily News* article about the plaintiff, which had been the subject of a separate, dismissed defamation claim.¹⁴

Applying New York substantive law, the Eastern District easily dismissed the invasion of privacy claims, described as "a hodgepodge of privacy-based claims."¹⁵ "New York does not recognize a common law right of privacy" based on tort concepts such as publicizing private matters or "unreasonable publicity."¹⁶ New York's privacy statute, Civil Rights Law sections 50 and 51, requires that there be a commercial or advertising use for a plaintiff's name or image.¹⁷ Even though defendant published plaintiff's photograph, it was in the course of a news story and was neither a commercial use nor actionable under the law.¹⁸

The plaintiff's newsworthiness also weighed heavily on the libel aspects of the lawsuit.¹⁹ The court addressed the two libel issues separately. The reposting of the previously published *New York Daily News* story about the plaintiff, republishing accusations about the plaintiff, was considered protected because the article had been the subject of an unsuccessful defamation claim in 2008.²⁰ The matter was dismissed under the civil procedure doctrine of issue preclusion.²¹ The court believed the plaintiff was attempting to relitigate the earlier case, which was dismissed and not properly appealed.²²

13. 2011 U.S. Dist. LEXIS 109056, at *1 (E.D.N.Y. Sept. 26, 2011).

14. *Id.* at *3-7.

15. *Id.* at *15.

16. *Id.* at *15-16 (citations omitted).

17. *Id.* at *16 (citing N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 2009)).

18. *Abakporo*, 2011 U.S. Dist. LEXIS 109056, at *17-18. Similarly, the intentional and negligent emotional distress claims were dismissed for failure to state a viable claim. *Id.* at *18.

19. *Id.* at *17.

20. *Id.* at *20.

21. *Id.*

22. *Abakporo*, 2011 U.S. Dist. LEXIS 109056, at *23.

The allegedly defamatory elements published as part of the coverage of a public petition against Nigerian officials with ties to the plaintiff presented an interesting argument. The defendant claimed the document was privileged as an official record under Civil Rights Law section 74.²³ The petition criticizing the government officials, however, did not fit into the penumbra of the privilege, the court held.²⁴ Without the statutory privilege, the court noted that the statements may be protected under the privilege that attaches to matters of public interest and the plaintiff may have to prove either gross negligence or actual malice, in addition to the elements of falsity and harm.²⁵ Thus, one count of defamation was not dismissed and will be subjected to pretrial discovery and, possibly, another pretrial motion.²⁶

A defamation claim by a former school head raised factual questions about a newspaper's articles and editorials alleging misappropriation and corruption, a trial court held in *Matovcik v. Times Beacon Record Newspapers*.²⁷ The court wrote:

Here, the appellate division has previously determined that the defendants have failed to show, as a matter of law, the necessary elements required to dismiss the defamatory action interposed against them. In the present motion, the defendants have offered no new evidence to establish that plaintiff collected workbook fees without the school district's knowledge.²⁸

A letter to the editor alleging a lawyer had made false statements before a tribunal and had been discharged by a client was not capable of defamatory meaning because the allegation was supported by video and a transcript from an administrative hearing, the appellate division ruled in *Konrad v. Brown*.²⁹ In affirming the pretrial dismissal, the court ruled:

The assertion that plaintiff, an attorney, had been discharged by a client, was true, as supported by the transcript of plaintiff's quantum meruit fee request wherein she stated that she had been discharged,

23. *Id.* at *24-25. This law provides immunity for news coverage or "a fair and true report of any judicial proceeding, legislative proceeding, or other official proceeding." N.Y. CIV. RIGHTS LAW § 74 (McKinney 2009). This privilege also attaches to public records associated with these types of government proceedings. *Id.*

24. *Abakporo*, 2011 U.S. Dist. LEXIS 109056, at *31-32.

25. *Id.* at *33-34 (citations omitted).

26. *Id.* at *35.

27. 40 Media L. Rep. (BNA) 1678, 1680 (Sup. Ct. Suffolk Cnty. 2012). This case was discussed in detail in an earlier *Survey* article. See Roy S. Gutterman, *Media Law, 2007-08 Survey of New York Law*, 59 SYRACUSE L. REV. 953, 956-57 (2009).

28. *Matovcik*, 40 Media L. Rep. (BNA) at 1680.

29. 91 A.D.3d 545, 546, 937 N.Y.S.2d 190, 191 (1st Dep't 2012).

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and, in any event, was not susceptible of a defamatory meaning because defendant did not mention any reasons for the discharge.³⁰

Additionally, the case was properly dismissed as protected opinion because, as a limited purpose public figure, plaintiff would have had to plead actual malice, and that the statements were published with either known falsity or reckless disregard for the truth.³¹

Allegations published in a weekly newspaper stating the plaintiff, a former school board member, had an association with a criminal and was arrested for a minor crime were not libel per se, a trial court ruled.³² The minor crime alleged was a misdemeanor, stealing lawn signs of a political opponent.³³ In dismissing the complaint for libel per se, the court laid out the black letter law on the tort: “a false statement, published without a privilege or authorization,” or negligence, which causes “special harm.”³⁴ The court further listed the three categories of libel per se: statements that a plaintiff committed a crime; statements that injure a plaintiff’s reputation in a trade, business, or profession; or statements that plaintiff contracted a loathsome disease.³⁵ “It does not appear to the Court that the ‘stealing’ of an opponent’s campaign signs would arouse public sentiment against the plaintiff to the extent necessary to support a claim for libel per se,” the court wrote.³⁶

Other statements about plaintiff were considered pure opinion and not actionable, as well.³⁷ “Although it is clear that the language was offensive to the plaintiff, it is not actionable as libel as it does not falsely relate factually ascertainable facts or characteristics concerning her,” the court wrote.³⁸

A convicted bank robber sought defamation and invasion of privacy damages from two movies, *Get Rich or Die Tryin’* and *13*, claiming that he was both depicted without his consent and falsely

30. *Id.*

31. *Id.* (adding that there was no proof that the statements were published with “ill will”).

32. *Huffine v. S. Shore Press*, No. 11-17764, 2012 NY Slip Op. 30169(U), at 5-6 (Sup. Ct. Suffolk Cnty. 2012).

33. *Id.* at 6.

34. *Id.* at 4 (quoting *Dillon v. City of New York*, 261 A.D.2d 34, 38, 704 N.Y.S.2d 1, 5 (1st Dep’t 1999)).

35. *Huffine*, 2012 NY Slip Op. 30169(U), at 4.

36. *Id.* at 6.

37. *Id.* at 6 (citing *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 286, 501 N.E.2d 550, 550, 508 N.Y.S.2d 901, 901 (1986)).

38. *Huffine*, 2012 NY Slip Op. 30169(U), at 6 (citing *600 W. 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 142, 603 N.E.2d 930, 936, 589 N.Y.S.2d 825, 831 (1992)).

depicted in the films.³⁹ The case, initially filed in state court and removed to federal court, was dismissed because the one-year statute of limitations for both causes of action had already elapsed.⁴⁰ The films were released in 2005 and 2010 respectively, and the court refused to consider rebroadcasts of the films on television as grounds to restart the statute of limitations.⁴¹

The substantive law on the two claims also proved unavailing for plaintiff.⁴² With regard to the defamation claims, plaintiff could not adequately prove that either film was “of and concerning,” him.⁴³ Elements in the films, such as similarity to his prison nickname, “Majestic,” and a character’s name in the film and an “attenuated” effort to link himself to the films through numbers and his address, were weak, the court wrote.⁴⁴ “There were no statements made about or to plaintiff. All of the assailed statements were made to a fictional character in a fictional movie,” the court wrote.⁴⁵

An affidavit attesting to statements in a published news story is “an appropriate vehicle for authenticating and submitting relevant documentary evidence,” the appellate division stated in *Muhlhahn v. Goldman*.⁴⁶ This emerged from a news story about a midwife and home-birthing advocate.⁴⁷ “Here, Goldman’s affidavit was sufficient to authenticate the recordings of his interviews with plaintiff, since he stated in his affidavit that he was a participant in the recorded conversations and that the recordings were complete and accurate and had not been altered,” the court wrote.⁴⁸ Thus, the documentary evidence supported defendant’s assertions, the court held.⁴⁹

II. DEFAMATION—PUBLIC/PRIVATE FIGURE/ACTUAL MALICE

A defamation claim by a former congressional candidate was properly dismissed because the underlying statements were protected

39. *Duncan v. Universal Music Grp. Inc.*, 2012 U.S. Dist. LEXIS 75998, at *2, *8 (E.D.N.Y. May 30, 2012); *see infra*, Part VII.

40. *Duncan*, 2012 U.S. Dist. LEXIS 75998, at *1, *8, *12-13 (citing N.Y. C.P.L.R. 215(3) (McKinney 2003)).

41. *Duncan*, 2012 U.S. Dist. LEXIS 75998, at *8.

42. *Id.* at *12.

43. *Id.* at *12.

44. *Id.* at *9-10.

45. *Id.* at *12.

46. 93 A.D.3d 418, 418, 939 N.Y.S.2d 420, 420 (1st Dep’t 2012).

47. *See generally* *Muhlhahn v. Goldman*, 2011 N.Y. Slip Op. 51683(U) (Sup. Ct. N.Y. Cnty. 2011) (dismissing defamation counts).

48. *Muhlhahn*, 93 A.D.3d at 419, 939 N.Y.S.2d at 420-21.

49. *Id.* at 418, 939 N.Y.S.2d at 420.

opinion and also barred by the actual malice rule, the appellate division ruled in *Russell v. Davies*.⁵⁰ Furthermore, much of the allegedly defamatory statements came from essays—interpreted as racist and anti-Semitic—which plaintiff wrote nine years before running for Congress.⁵¹

Applying the three-prong analysis to determine whether a statement is protected opinion, the court focused on the second and third prongs, relating to the provability of the statements and their context.⁵² The court wrote:

In this case, the context of the complained-of statements was such that a reasonable reader would have concluded that he or she was reading and/or listening to opinions, and not facts, about the plaintiff. Moreover, in all instances, the defendants made the statements with express reference to the essay written by the plaintiff, including quotations from the essay. Thus, the statements of opinion are non-actionable on the additional basis that there was full disclosure of the facts supporting the opinions.⁵³

A federal court held that a Russian politician and businessman should be treated as a public official or public figure, thus requiring him to prove that a newspaper, letter-writer, and non-governmental organization defamed him with actual malice.⁵⁴ Plaintiff sought recovery for a series of newspaper articles and letters that accused him of anti-Semitism, anti-Americanism, xenophobia, and corruption.⁵⁵

Since the law of defamation became constitutionalized, courts have repeatedly held foreign public officials to the actual malice standard.⁵⁶ Furthermore, plaintiff held a powerful office in the Russian parliament, was engaged in high-profile business deals, which included securing a \$1 billion loan, and was able to employ significant safeguards to protect his reputation, including hiring lawyers, public relations professionals, and other consultants.⁵⁷ These factors added up to dismissing the complaint because he could not prove that the statements were

50. 97 A.D.3d 649, 649-51, 948 N.Y.S.2d 394, 395-96 (2d Dep't 2012).

51. *Id.* at 650, 948 N.Y.S.2d at 395.

52. *Id.* at 650-51, 948 N.Y.S.2d at 396.

53. *Id.* at 651, 948 N.Y.S.2d at 396.

54. *Egiazaryan v. Zalmayev*, 2011 U.S. Dist. LEXIS 140851, at *1, *2, *13-15 (S.D.N.Y. Dec. 6, 2011).

55. *Id.* at *3-5.

56. *Id.* at *12; *see generally* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *see also generally* *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984).

57. *Egiazaryan*, 2011 U.S. Dist. LEXIS 140851, at *13-14.

published with either known falsity or reckless disregard for the truth.⁵⁸

A counterclaim based on New York's anti-Strategic Lawsuits Against Public Participation statute could go forward, the court held.⁵⁹ This law provides a cause of action for defendants involved in actions aimed at silencing, intimidating, or punishing their participation in public affairs.⁶⁰ Plaintiff was firmly involved in public affairs, in particular, an application for political asylum, triggering application of the statute.⁶¹

III. DEFAMATION—OPINION

Calling someone a criminal, in this case, alleging plaintiff was a child molester and rapist, could be defamatory, the Court of Appeals ruled.⁶² Though this case did not deal with media litigants, the Court reiterated several points on defamation law, primarily the nuances between defamatory fact and protected opinion.⁶³ This task, acknowledged as “often difficult to distinguish,” requires a three-prong analysis which looks at: (1) the precise meaning of the utterances; (2) whether the statements can be proven true or false; and (3) the overall context of the statements.⁶⁴ Discrepancies in evidence, including statements made in depositions, created factual questions best resolved at trial, the Court ruled.⁶⁵

A radio talk show host's question accusing a recently-acquitted defendant of “cold-blooded murder” was deemed protected opinion, the appellate division ruled in *Gisel v. Clear Channel Communications*.⁶⁶ There, the radio host, Robert Lonsberry, commented on the murder trial of John Gisel, who had been acquitted in a case that was deemed a hunting accident.⁶⁷ In an on-air discussion of the high-profile case, Lonsberry asked Gisel's sister several questions, including probing her on “how it felt to have a brother who was ‘a cold-blooded murderer’”

58. *Id.* at *17-18.

59. *Id.* at *36; see N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2009).

60. *Egiazaryan*, 2011 U.S. Dist. LEXIS 140851, at *31-32 (citing 600 W. 115th St. Corp. v. Von Gutfeld, 80 N.Y.2d 130, 137 n.1, 135 N.E.2d 930, 933 n.1, 589 N.Y.S.2d 825, 828 n.1 (1992)); N.Y. CIV. RIGHTS LAW § 70-a.

61. *Egiazaryan*, 2011 U.S. Dist. LEXIS 140851, at *36.

62. *Thomas H. v. Paul B.*, 18 N.Y.3d 580, 582-84, 965 N.E.2d 939, 941-42, 942 N.Y.S.2d 437, 439-40 (2012).

63. *Id.* at 584-85, 965 N.E.2d at 942-43, 942 N.Y.S.2d at 440-41.

64. *Id.* at 584, 965 N.E.2d at 942, 942 N.Y.S.2d at 440 (quoting *Brian v. Richardson*, 87 N.Y.2d 46, 51, 660 N.E.2d 1126, 1129, 637 N.Y.S.2d 347, 350 (1995)).

65. *Thomas H.*, 18 N.Y.3d at 585, 965 N.E.2d at 943, 942 N.Y.S.2d at 441.

66. 94 A.D.3d 1525, 1525-26, 942 N.Y.S.2d 751, 752 (4th Dep't 2012).

67. *Id.*

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and whether he “put a notch in the stock of his gun as he kills people.”⁶⁸ Defendant also said that the “hunting incident could not have been an accident.”⁶⁹

Plaintiff argued that the statements were defamatory, imputing criminal activity.⁷⁰ As a matter of law, however, the comments, though clearly “harsh and intemperate language,” were not defamatory under the opinion privilege.⁷¹ To arrive at its decision, the court went through a four-prong analysis under *Steinhilber v. Alphonse*.⁷² *Steinhilber* requires the court to consider: (1) whether the language has a precise, readily understood meaning; (2) whether the statement could be “objectively” characterized as provably true or false; (3) the context of the statement; and (4) the broader social context of the communication.⁷³

While the court wrote that the statements were not capable of being objectively proven true or false,⁷⁴ it most clearly applied a contextual review of the comments.⁷⁵ Further, the court determined that in the heat of a radio debate on a widely discussed and seemingly controversial criminal case, the statements had to be viewed as protected opinion.⁷⁶

The court wrote:

[T]he context in which the statements were made supports the conclusion that a reasonable listener would not have thought that Lonsberry was stating facts. Lonsberry’s show used a call-in format and generally provided a forum for public debate on newsworthy topics, and his statements were made during an on-air debate with his listeners regarding plaintiff’s culpability and whether the jury had properly acquitted plaintiff.⁷⁷

A controversy involving abuse allegations leveled against a Syracuse University assistant basketball coach made national headlines and also generated a substantive, but unreported, opinion by a state

68. *Id.* at 1526, 942 N.Y.S.2d at 752.

69. *Id.*

70. *See id.* at 1525, 942 N.Y.S.2d at 752.

71. *Gisel*, 94 A.D.3d at 1527, 942 N.Y.S.2d at 753.

72. *Id.* at 1526, 942 N.Y.S.2d at 752 (citing *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 292, 501 N.E.2d 550, 554, 508 N.Y.S.2d 901, 905 (1986)).

73. *Steinhilber*, 68 N.Y.2d at 292, 501 N.E.2d at 554, 508 N.Y.S.2d at 905 (Court of Appeals imported the four prongs from *Ollman v. Evans*) (citing *Ollman v. Evans*, 750 F.2d 970, 979-83 (D.C. Cir. 1984), *cert denied*, 471 U.S. 1127 (1985)).

74. *Gisel*, 94 A.D.3d at 1526, 942 N.Y.S.2d at 753.

75. *Id.*, 942 N.Y.S.2d at 752.

76. *Id.* at 1526-27, 942 N.Y.S.2d at 752-53.

77. *Id.*, 942 N.Y.S.2d at 753.

supreme court justice in *Davis v. Boeheim*.⁷⁸ The defamation case emerged from a post-game press conference in which Syracuse University basketball coach, Jim Boeheim, questioned the motives of the two accusers, former ball boys from the 1980s, and the validity of their accusations against assistant coach Bernie Fine.⁷⁹

Specifically, plaintiffs alleged that Boeheim's comments characterizing the allegations as "false" while also saying, "[i]t is a bunch of a thousand lies"⁸⁰ constituted an actionable defamatory statement.⁸¹ In dismissing the claim on a pretrial motion, the court examined the statements themselves, as well as the First Amendment implications of the speech at issue.⁸² The court examined and applied a slew of New York State precedent as well as several major United States Supreme Court defamation cases.⁸³

The determination of whether a statement is indeed opinion, or, more importantly, protected opinion, is a matter of law, the court noted.⁸⁴ Applying the three-pronged analysis employed in *Brian v. Richardson*, the court weighed:⁸⁵ (1) whether the specific language used had a precise and readily understood meaning; (2) whether the statements were capable of being proven true or false; and (3) whether the full context of the communication or the broader social context and surrounding circumstances would have signaled readers or listeners that the statement was likely to be opinion, rather than fact.⁸⁶ "This court's review of the statements establishes that they could not be construed as defamatory, but rather constituted personal opinion and rhetorical hyperbole rather than objective fact. Therefore, they are constitutionally protected," the court wrote after a detailed application of the law on protected opinion as well as the defamatory impact of the

78. No. 2012-EF-1, at 2 (Sup. Ct. Onondaga Cnty. 2012) (order and decision).

79. *Id.* at 4-6.

80. *Id.* at 5.

81. *See id.* at 6.

82. *Id.* at 6-7.

83. *Davis*, No. 2012-EF-1, at 7 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (establishing that public figures must show that they were defamed with actual malice, i.e., either known falsity or reckless disregard for the truth); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (holding that states may extend the actual malice rule to public figures); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (holding that rhetorical hyperbole, unprovable statements, or pure opinion will not be actionable)).

84. *Davis*, No. 2012-EF-1, at 7-8 (citing *Mann v. Abel*, 10 N.Y.3d 271, 276, 885 N.E.2d 884, 885, 856 N.Y.S.2d 31, 32 (2008)).

85. *Davis*, No. 2012-EF-1, at 8-9 (citing *Brian v. Richardson*, 87 N.Y.2d 46, 51, 660 N.E.2d 1126, 1129, 637 N.Y.S.2d 347, 350 (1995)) (citation omitted).

86. *Davis*, No. 2012-EF-1, at 8-9 (citing *Brian*, 87 N.Y.2d at 51, 660 N.E.2d at 1129, 637 N.Y.S.2d at 350) (citation omitted).

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language itself.⁸⁷

An action against a newspaper by several police officers, including the chief of police for the Village of Brockport, seeking to unmask the identities of people who posted sarcastic and offensive comments about them was unavailing.⁸⁸ To identify anonymous online posters, a plaintiff must establish a prima facie case in order to compel a party to turn over data to identify the appropriate defendant or parties.⁸⁹ This process is subject to a series of intensive, fact-sensitive prongs, which the court alluded to, but did not apply or thoroughly discuss because of fatal deficiencies in plaintiffs' case.⁹⁰

A plaintiff must establish a prima facie case that the defendants committed the alleged tort, which in the instant matter, would have been defamation, as published in the newspaper's online comments.⁹¹ As a matter of law, the statements were not only protected opinion, but because plaintiffs were government officials, they would have had to prove the statements were also made with actual malice.⁹²

The court wrote:

The anonymous comments expressed opinions that the Village of Brockport Police Department was not properly serving the citizens of Brockport. The tone of the comments was sarcastic, hyperbolic, and based on rumors that the anonymous posters heard around the Village . . . the apparent purpose of the comments made by the John/Jane Doe defendants was to call for an investigation into the Department's practices.⁹³

In conclusion, the court held:

Given this contextual background, the Court finds that the comments posted by the four John/Jane Doe defendants on the Democrat & Chronicle's website constitute expressions of protected opinion, and because opinions cannot form the basis of a defamation claim, defendant Gannett is not required to unmask the identities of the four

87. *Davis*, No. 2012-EF-1, at 20 (citations omitted).

88. *Varrenti v. Gannett Co.*, 33 Misc. 3d 405, 406-07, 413, 929 N.Y.S.2d 671, 677 (Sup. Ct. Monroe Cnty. 2011).

89. *Id.* at 410-11, 929 N.Y.S.2d at 675.

90. *Id.* (citing *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 760-61 (N.J. Super. Ct. App. Div. 2001); *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564-65 (S.D.N.Y. 2004)).

91. *Varrenti*, 33 Misc. 3d at 411, 929 N.Y.S.2d at 676 (citing *Dillon v. City of New York*, 261 A.D.2d 34, 38, 704 N.Y.S.2d 1, 5 (1st Dep't 1999)).

92. *Varrenti*, 33 Misc. 3d at 411, 929 N.Y.S.2d at 676 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

93. *Varrenti*, 33 Misc. 3d at 412, 929 N.Y.S.2d at 677.

anonymous internet commentators.⁹⁴

IV. DEFAMATION—PRIVILEGE/SLAPP

A local cable television news report on a housing discrimination dispute was not defamatory, a state trial court held.⁹⁵ Plaintiff had been accused of discriminating against residents infected with AIDS.⁹⁶ Because housing discrimination is considered a matter of public interest, the court held plaintiff would be required to prove the defamation was the result of “gross irresponsibility.”⁹⁷ The plaintiff could not.⁹⁸

In dismissing the defamation claims against the journalists, the court wrote: “[h]ere, although the language employed by the media defendants in their reporting and introduction of the subject news feature, may be somewhat colorful, it does not, in its plain meaning, indicate that the defendants endorse the [plaintiffs’] position or are defamatory in any way.”⁹⁹

A magazine’s reliance on and quotations from a criminal complaint and associated documents was protected under the fair and accurate report privilege set forth in Civil Rights Law section 74.¹⁰⁰ The article in question quoted heavily from the documents and was entitled to absolute protection, the court held.¹⁰¹

Similarly, news reports in a legal newspaper about a lawyer’s lawsuit for back fees was also protected under the fair and accurate report privilege, a trial court held.¹⁰² The court wrote:

The Articles summarized plaintiff’s statements as an admission that he was wrong. The articles did not need to be a word-for-word recitation of all the statements in Plaintiff’s Affidavit, but merely a substantially accurate account of the substance of the proceedings. Minor inaccuracies in an article are insufficient to set aside the absolute

94. *Id.* at 413, 929 N.Y.S.2d at 677.

95. *Levy v. Johnson*, No. 2851/09, 2012 NY Slip Op. 30639(U), at 9 (Sup. Ct. Nassau Cnty. 2012).

96. *Id.* at 3.

97. *Id.* at 5 (citation omitted).

98. *Id.*

99. *Id.* at 7.

100. *Klig v. Harper’s Magazine Found.*, No. 600899/10, 2011 NY Slip Op. 31173(U), at 2, 13 (Sup. Ct. Nassau Cnty. 2011); N.Y. CIV. RIGHTS LAW § 74 (McKinney 2009).

101. *Klig*, 2011 NY Slip Op. 31173(U), at 13.

102. *Adams v. ALM Media Props., LLC*, No. 115525/2010, 2011 NY Slip Op. 33047(U), at 6 (Sup. Ct. N.Y. Cnty. 2011).

privilege of Civil Rights Law section 74.¹⁰³

V. DEFAMATION—ONLINE IMMUNITY CDA SECTION 230

A website known for providing disgruntled consumers with a public venue to publish complaints may have immunity under section 230 of the Communications Decency Act.¹⁰⁴ The trial court denied the website's motion to dismiss a defamation claim based on posts on the site, the *pissedconsumer*.¹⁰⁵ Section 230 provides immunity for certain websites or interactive computer services for a range of torts, including defamation.¹⁰⁶ This immunity treats qualifying websites as distributors, rather than publishers, who exert control over the content.¹⁰⁷ The court wanted to allow discovery to determine whether defendant should be treated as an author or content originator, which would not allow a finding of immunity.¹⁰⁸ The court did dismiss a raft of other claims, including extortion, racketeering, trademark infringement and a second defamation claim.¹⁰⁹

VI. DEFAMATION—MISCELLANEOUS

A. Jurisdiction

Critical comments and essays posted on a website created insufficient contacts within the State of New York to satisfy jurisdictional requirements, the Court of Appeals held in *SPCA of Upstate N.Y., Inc. v. American Working Collie Association*.¹¹⁰ The allegedly defamatory statements emerged from an animal abuse case, which defendant wrote about on the organization's website.¹¹¹

The substantive defamatory claim, animal abuse and mistreatment, was not dispositively discussed in the arguments on whether New York was the proper jurisdiction.¹¹² The case focused on Civil Practice Law and Rules ("CPLR") 302(a)(1), which grants jurisdiction in the state in

103. *Id.* N.Y. CIV. RIGHTS LAW § 74.

104. *VO Grp. LLC v. Op. Corp.*, 2012 N.Y. Misc. LEXIS 4497, at *4-6 (Sup Ct. Kings Cnty. 2012); *see* 47 U.S.C. § 230 (2006).

105. *VO Grp. LLC*, 2012 N.Y. Misc. LEXIS 4497, at *4-6; *see* 47 U.S.C. § 230.

106. *VO Grp. LLC*, 2012 N.Y. Misc. LEXIS 4497, at *4-6; *see* 47 U.S.C. § 230.

107. *VO Grp. LLC*, 2012 N.Y. Misc. LEXIS 4497, at *4-5 (citations omitted).

108. *Id.* at *5.

109. *Id.* at *8-14.

110. 18 N.Y.3d 400, 403, 963 N.E.2d 1226, 1228, 940 N.Y.S.2d 525, 527 (2012).

111. *Id.* at 402, 963 N.E.2d at 1227, 940 N.Y.S.2d at 526.

112. *Id.* at 405, 963 N.E.2d at 1229, 940 N.Y.S.2d at 528.

cases of tortious activity.¹¹³ However, New York has recognized that defamation, which is indeed a tort, should be treated differently than most other torts.¹¹⁴ CPLR 302(a)(2), (3) provides an exception for defamation.¹¹⁵ “Defamation claims are accorded separate treatment to reflect the State’s policy of preventing disproportionate restrictions on freedom of expression,” the Court wrote.¹¹⁶

Defendant’s actions in the state—two short site visits, three telephone calls, and a donation of money and pet equipment—were not sufficient enough to create standing and were not sufficiently related to the allegedly defamatory statements published on the website, the Court held.¹¹⁷ The web-based statements were also not sufficiently aimed at New Yorkers.¹¹⁸ “While they were posted on a medium that was accessible in this state, the statements were equally accessible in any other jurisdiction,” the Court wrote.¹¹⁹ In the end, the connection between the litigants was “too tangential” to establish personal jurisdiction.¹²⁰

YouTube videos posted by Colorado residents about a New York lawyer did not satisfy the “narrow” requirements to establish personal jurisdiction in the district, the Second Circuit affirmed in *Penachio v. Benedict*.¹²¹

“New York courts do not interpret ‘transacting business’ to include ‘defamatory utterances’ sent into New York State, unless the conduct also included ‘something more,’” the court wrote, interpreting CPLR 302(a)(1).¹²² Plaintiff had argued that defendants established sufficient ties to the jurisdiction because they attended a court guardianship proceeding, contacted New York residents via e-mail and telephone, and posted their YouTube videos online.¹²³

The court relied on the *SPCA of Upstate N.Y., Inc.* case to dismiss

113. *Id.* at 403-04, 963 N.E.2d at 1228-29, 940 N.Y.S.2d at 527-28.

114. *Id.*

115. *SPCA of Upstate N.Y., Inc.*, 18 N.Y.3d at 403-04, 963 N.E.2d at 1228-29, 940 N.Y.S.2d at 527-28 (citation omitted).

116. *Id.*

117. *Id.* at 405, 963 N.E.2d at 1229, 940 N.Y.S.2d at 528.

118. *Id.*

119. *Id.*

120. *SPCA of Upstate N.Y., Inc.*, 18 N.Y.3d at 405, 963 N.E.2d at 1230, 940 N.Y.S.2d at 529.

121. 461 F. App’x 4, 5 (2d Cir. 2012); *see also* *Penachio v. Benedict*, 2010 U.S. Dist. LEXIS 119052, at *1 (S.D.N.Y. Nov. 9, 2010).

122. *Penachio*, 461 F. App’x at 5 (quoting *Best Van Lines Inc. v. Walker*, 490 F.3d 239, 248-49 (2d Cir. 2007)).

123. *Penachio*, 461 F. App’x at 5.

the action.¹²⁴ The court did not find sufficient ties to the jurisdiction and held that defendants did not conduct sufficient business in the jurisdiction to seat the case in New York.¹²⁵ “Accordingly, the district court properly determined that plaintiffs failed to show a substantial relationship between the defamatory videos and the actions of the defendants in New York State,” the court concluded.¹²⁶ An interactive website, run by a woman in Georgia with no business or subject matter ties to New York, could not be dragged into New York State courts for purposes of defamation, invasion of privacy, and emotional distress claims related to postings on the site.¹²⁷ Aside from the well-worn jurisdictional issues discussed at length in some other cases based on New York’s long-arm statute, CPLR 302, which specifically precludes out-of-state defamation claims,¹²⁸ because the offensive postings were made on the website by a third-party, the court also grounded its dismissal on the Communications Decency Act section 230.¹²⁹

B. Choice of Law

New Jersey federal courts were a more appropriate venue for a defamation case against a New Jersey writer and online web publisher, the Western District held in *NXIVM Corp. v. Ross*.¹³⁰ This case, the subject of extensive wrangling over venue, had already been transferred to New Jersey’s federal courts, where defendant lives and operates his websites.¹³¹ The underlying dispute involved critical comments posted about plaintiff’s organization that provides training for self-help counseling.¹³² Because the New Jersey court “has already deeply familiarized itself with the factual and legal circumstances of the case before it,” New Jersey’s federal courts were a more “efficient,” “economical” and appropriate venue.¹³³

124. *Id.* at 3-4 (citing *SPCA of Upstate N.Y., Inc. v. Am. Working Collie Ass’n*, 74 A.D.3d 1464, 1466, 903 N.Y.S.2d 562, 564-65 (3d Dep’t 2010)).

125. *Penachio*, 461 F. App’x at 6.

126. *Id.* at 6-7.

127. *Foster v. Matlock*, No. 110365/11, 2012 NY Slip Op. 31363(U), at 3-4 (Sup. Ct. N.Y. Cnty. 2012).

128. *Id.* (citation omitted).

129. *Id.* (citing 47 U.S.C. § 230 (2006); *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 17 N.Y.3d 281, 289, 952 N.E.2d 1011, 1017, 929 N.Y.S.2d 19, 25 (2011)).

130. 2011 U.S. Dist. LEXIS 123143, at *1, *9 (W.D.N.Y. Oct. 23, 2011).

131. *Id.* at *3, *6.

132. *Id.* at *2.

133. *Id.* at *7.

C. Single Publication Rule/Statute of Limitations

A newspaper's "restoration" of an allegedly defamatory news article on its website was not republication, a trial court held in *Martin v. Daily News, L.P.*¹³⁴ The one-year statute of limitations barred a judge's libel claim over an article published in 2007.¹³⁵ The republication argument arose after the newspaper changed its content management system for online access to the newspaper and recent archives, which for an unexplained reason did not include the transfer of the article in question.¹³⁶ Upon learning that this article did not make the transfer, counsel recommended that the editors get the article back on the website, which required an editor to recreate the story as it had been published initially with the headline, byline, and uncorrected text along with a host of computer codes.¹³⁷ Plaintiff argued that this refreshed the article and created a new timeline for the libel claim as republication or a new publication.¹³⁸

Republication, key to determining when the one-year statute of limitations begins, is determined "case-by-case" and is still a rigid procedural bar, even with the internet, the court held.¹³⁹ "Consistent with its purpose, the single publication rule applies to Internet publications and each viewing of defamatory material on the Internet is not deemed a new publication," the court wrote.¹⁴⁰

The court wrote: "[a]gainst the foregoing backdrop, and given that only minor changes were made to the 2007 Article, its restoration to the [*Daily News, L.P.*] website is akin to a delayed circulation of the original, rather than a republication."¹⁴¹ Thus, the claim was time barred by the statute of limitations.¹⁴²

D. Single Instance Rule/Evidence

Contract-based litigation involving a television reporter's firing also included claims for defamation relating to comments posted about her in online forums in *DiFolco v. MSNBC Cable L.L.C.*¹⁴³

Plaintiff claimed that several unflattering comments posted online

134. 2012 N.Y. Misc. LEXIS 1753, at *1, *10 (Sup. Ct. N.Y. Cnty. 2012).

135. *Id.* at *10.

136. *Id.* at *2.

137. *Id.* at *2-3.

138. *Id.* at *3.

139. *Martin*, 2012 N.Y. Misc. LEXIS 1753, at *6.

140. *Id.* at *7-8.

141. *Id.* at *10.

142. *Id.*

143. 831 F. Supp. 2d 634, 637 (S.D.N.Y. 2011).

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defamed her and caused damage to her reputation.¹⁴⁴ One statement commented on her dismissal from the cable news channel while another offered a more pointed criticism of her on-air persona and overall professionalism.¹⁴⁵ In addition to deeming the comments pure opinion, the court rejected the claims because the plaintiff offered no proof that the statements were made by any of the defendants involved in the case.¹⁴⁶

The more substantive analysis focused on New York’s “single instance” rule, which bars defamation recovery for a statement “charging another with a single dereliction in connection with his or her trade, occupation or profession [that] does not necessarily charge that party with general incompetence, ignorance or lack of skill and is not deemed actionable unless special damages are pleaded and shown.”¹⁴⁷

Applying this rule, the court wrote: “[s]uch a report of Plaintiff’s ‘single instance’ of resigning—even in the middle of a contract—is not actionable under New York law absent allegations of special damages.”¹⁴⁸

E. Trade Disparagement

A television consumer reporter’s statements about the fat and nutritional content of an ice cream store chain’s “healthier alternative” products may be defamatory, a state court ruled in *Prince v. Fox Television Stations, Inc.*¹⁴⁹ The heart of this multiparty complaint was whether statements made by longtime New York City consumer reporter, Arnold Diaz, and his famous “Hall of Shame” could be interpreted as defamatory and whether the comments constituted trade disparagement.¹⁵⁰ Defendant’s two motions argued the claims should be dismissed based on CPLR 3211(a)(1) because of documentary evidence and 3211(a)(7) for failure to state a claim.¹⁵¹

Defendant’s affidavits supporting the claims in the news report, which was also based on independent lab results, were inconclusive, the

144. *Id.* at 644.

145. *Id.* at 645.

146. *Id.* at 646 (“Theories and beliefs, however, are not enough to survive summary judgment. Evidence is required.”).

147. *Id.* at 649 (quoting *Bowes v. Magna Concepts, Inc.*, 166 A.D.2d 347, 348, 561 N.Y.S.2d 16, 17 (1st Dep’t 1990)).

148. *DiFolco*, 831 F. Supp. 2d at 649 (citing *Bowes*, 166 A.D.2d at 349, 561 N.Y.S.2d at 18).

149. 2011 N.Y. Misc. LEXIS 5559, at *21 (Sup. Ct. N.Y. Cnty. 2011).

150. *Id.* at *3.

151. *Id.* at *1.

court held.¹⁵² There was sufficient ambiguity surrounding the identity of the proper plaintiffs because some of the plaintiffs included licensees and franchisees as well as the manufacturing company, the court held.¹⁵³

Likewise, the trade disparagement claim could go forward, the court held.¹⁵⁴ This aspect of the tort requires a false statement about the condition, value, or quality of a product or property with proof of actual malice and special damages.¹⁵⁵

VII. INVASION OF PRIVACY

A number of litigants included invasion of privacy claims with a host of other claims, mostly defamation. Thus, many of the cases in this section could easily be discussed in the defamation section of this Article. State and federal courts continued to interpret New York's invasion of privacy law, under Civil Rights Law sections 50 and 51, narrowly, preserving the claim for actions with a commercial or advertising element. The public disclosure that a woman suffered from the illness fibromyalgia did not create an invasion of privacy, the Second Circuit held.¹⁵⁶ Fibromyalgia, the court held, did not rise to the level of serious diseases, such as HIV, AIDS, or other diseases, that expose people to hostility or discrimination, to create a constitutionally protected right to privacy.¹⁵⁷ There was no "societal discrimination and intolerance" toward people with fibromyalgia, the court added.¹⁵⁸

In this case, the public disclosure emerged from an investigation into allegations of plaintiff's medical leave by the Special Commissioner of Investigation ("SCI").¹⁵⁹ The court wrote:

The SCI's frequent public release of its reports suggests that, rather than publishing Matson's report to embarrass or humiliate her, the SCI published the Report on its website as part of its policy to inform the public of its efforts to investigate instances of fraud within the New York City public school system. In any case, Matson has not alleged that she was, in fact, embarrassed or humiliated, nor has she challenged the SCI's findings and recommendations.¹⁶⁰

152. *Id.* at *3.

153. *Id.* at *17.

154. *Prince*, 2011 N.Y. Misc. LEXIS 5559, at *25-26.

155. *Id.* at *22.

156. *Matson v. Bd. of Educ. of City Sch. Dist. of N.Y.*, 631 F.3d 57, 69 (2d Cir. 2011).

157. *Id.* at 62.

158. *Id.* at 67.

159. *Id.* at 68.

160. *Id.*

An invasion of privacy claim appended to a defamation suit by a convicted bank robber arguing two movies unfairly appropriated his image and likeness was unavailing.¹⁶¹ Discussed as a defamation case involving the two films *Get Rich or Die Tryin'* and *13*, the court was skeptical of plaintiff's arguments.¹⁶² The use of similar nicknames in a fictional film was "insufficient" to state a cause of action, the court said.¹⁶³ Furthermore, the court reiterated that a fictional film does not fall under the intent of Civil Rights Law sections 50 and 51.¹⁶⁴ "There are no allegations whatsoever that can be construed as use of the plaintiff's name, portrait, picture or voice."¹⁶⁵ "Plaintiff contends that numeric codes link a character in the movie to him; however, no rational viewer would connect the purported numeric codes to plaintiff," the court held.¹⁶⁶

A New York supreme court sealed filings in a privacy case involving a model who appeared in a web-based commercial for a jewelry company in *Doe v. Szul Jewelry, Inc.*¹⁶⁷ Plaintiff performed in a video recording for the jewelry company, but she claimed the videographer and jewelry company misled her by saying the video would be "comedic," but instead created a sexually explicit impression based on her receipt of a necklace.¹⁶⁸ Plaintiff argued that she never signed a release for the commercial use of her image and video, especially in a graphically sexual tone.¹⁶⁹ The misuse of the video, she argued, violated her statutory right to privacy under Civil Rights Laws sections 50 and 51.¹⁷⁰

In the recent opinion in the case, the court focused on the secretive nature of the proceedings, particularly plaintiff's motion to seal the

161. *Duncan v. Universal Music Grp.*, 2012 U.S. Dist. LEXIS 75998, at *2-3, *8 (E.D.N.Y. May 30, 2012).

162. *Id.* at *9-10.

163. *Id.* at *9.

164. *Id.* at *10-11 (citing *Costanza v. Seinfeld*, 279 A.D.2d 255, 255, 719 N.Y.S.2d 29, 30 (1st Dep't 2001); *Lemerond v. Twentieth Century Fox Film Corp.*, 2008 U.S. Dist. LEXIS 26947, at *4, *8 (S.D.N.Y. Mar. 31, 2008)); N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2009).

165. *Duncan*, 2012 U.S. Dist. LEXIS 75998, at *10.

166. *Id.*

167. No. 604277/2007, 2011 NY Slip Op. 32195(U), at 2 (Sup. Ct. N.Y. Cnty. 2011).

168. *Id.* See *Doe v. Szul Jewelry, Inc.*, 2008 N.Y. Misc. LEXIS 8733, at *2 (Sup. Ct. N.Y. Cnty. 2008).

169. *Doe*, 2008 N.Y. Misc. LEXIS 8733, at *3.

170. *Id.* at *3-4. These sections of the law require that plaintiff prove (1) her image, portrait, picture, or voice was used; (2) in New York State; (3) for advertising or trade purposes; and (4) without written consent. N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2009).

record, which the court granted.¹⁷¹ The court believed the public had “no significant interest in having access to the records” in the case.¹⁷²

More significantly, the court wrote:

This is not, for instance, a tort action involving allegations of defective products where the sealing of records would prevent members of the public from receiving notice of the potential harm of products they had purchased. Nor is it an action involving the conduct of a government agency or any matter of public concern. It is, instead, a private matter between parties and involves material of a salacious nature, the continued public availability of which could cause significant harm to plaintiffs career and reputation.¹⁷³

A former gymnast involved in an acrimonious lawsuit against a family who took care of her after a paralyzing injury incurred at the Goodwill Games in 1998, sustained a motion to dismiss claims for both defamation and invasion of privacy in *Sang Lan v. AOL Time Warner, Inc.*¹⁷⁴ The allegedly defamatory statements were published on a Chinese sports website and included comments posted by people online.¹⁷⁵

Because there were multiple parties, comments, and competing motions, the court ruled that only a portion of the statements posted could be actionably defamatory.¹⁷⁶ The statements provide that plaintiff “is too lazy, can’t get a job” and that the speaker had somehow played a role in helping her secure a job, which she lost “because she didn’t want to do any work.”¹⁷⁷

The invasion of privacy claim also survived the motion, the court ruled, because defendants used a photograph of plaintiff in connection with a compact disc cover and other promotional materials without her consent.¹⁷⁸

Late night comedian Jimmy Kimmel’s use, manipulation, and mockery of a video he obtained from YouTube was not an invasion of privacy under New York law in *Sondik v. Kimmel*.¹⁷⁹ The trial court dismissed the claim for invasion of privacy under both New York and

171. *Doe*, 2011 NY Slip Op. 32195(U), at 5.

172. *Id.* at 4.

173. *Id.*

174. 2011 U.S. Dist. LEXIS 155037, at *2, *6, *34-36 (S.D.N.Y. Nov. 21, 2011), *aff’d in part rev’d in part*, 2012 U.S. Dist. LEXIS 65307 (S.D.N.Y. May 9, 2012).

175. *Id.* at *6.

176. *Id.* at *24-25.

177. *Id.* A number of other statements pleaded in the complaints were not actionable as protected opinion, the court held. *Id.*

178. *Sang Lan*, 2011 U.S. Dist. LEXIS 155037, at *27.

179. No. 30176/10, 2011 NY Slip Op. 52262(U), at 1 (Sup. Ct. Kings Cnty. 2011).

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California law, though it found New York law applied because plaintiff lived in New York and purported to be injured in the jurisdiction.¹⁸⁰

Plaintiff argued Kimmel's use of the video without his consent or any compensation violated his right to publicity and entitled him to damages under Civil Rights Law sections 50 and 51 for commercial appropriation of his likeness and image.¹⁸¹ The tort requires a strict commercial element to the use, and is "narrowly construed" by courts.¹⁸² Additionally, courts apply the newsworthy exception broadly, even finding comedic performances somewhat newsworthy, if not noncommercial.¹⁸³ The court wrote: "a review of the DVD of the segment supplied by defendants demonstrates that the clip of plaintiff at issue was used as part of a comedic (or at least an attempted comedic) or satiric parody . . . itself undoubtedly an event that was newsworthy or of public interest."¹⁸⁴

"Even if the newsworthy exception did not apply here, the use of the clip in this entertainment context raises serious First Amendment concerns that would likewise require dismissal of the section 50 and 51 claims," the court added.¹⁸⁵ The complaint also lacked proof of unjust enrichment or any proof relating to the provenance of the video, which someone posted on YouTube.¹⁸⁶

Though not a case involving media, a landlord's use of a recording device in an apartment building's common hallway was not an invasion of privacy, a state court ruled.¹⁸⁷ The alleged tortious action here, recording a party without consent in a quasi-public place,¹⁸⁸ has applications to media entities. The court succinctly dismissed the claims: "[w]hile plaintiffs' expectation of privacy in their apartment behind the closed door is reasonable, an expectation of privacy in the hallway is not reasonable because it is accessible to other persons."¹⁸⁹ The court also dismissed the claims because, under sections 50 and 51, there was no evidence that defendants' use of the video came anywhere

180. *Id.* at 3.

181. *Id.*

182. *Id.* at 4 (citation omitted).

183. *Id.* (citations omitted).

184. *Sondik*, No. 30176/10, 2011 NY Slip Op. 52262(U), at 4-5.

185. *Id.* at 6.

186. *Id.*

187. *Otero v. Hous. St. Owners Corp.*, 2012 N.Y. Misc. LEXIS 855, at *1 (Sup. Ct. N.Y. Cnty. 2012).

188. *Id.* at *7.

189. *Id.* at *10 (citations omitted).

close to a commercial or advertising use.¹⁹⁰

VIII. INTELLECTUAL PROPERTY

A. Copyright Generally

A copyright infringement claim involving the hit comedy *Modern Family* was properly dismissed because there were no protectable elements or substantial similarities to justify going forward.¹⁹¹ In *Alexander v. Murdoch*, the Second Circuit affirmed dismissal: “[a]s applied, for the reasons thoroughly articulated by the magistrate judge, the sparse and minor similarities between the allegedly infringing work—the television series ‘*Modern Family*’—and the copyrighted work—the pilot treatment for the television series ‘*Loony Ben*’—are insufficient to establish infringement.”¹⁹²

The plot and character similarities between plaintiff-appellant’s work and the hit television show, the court said, were shared at only the “‘most general level’” and were “superficial” and “de minimis.”¹⁹³ The similarities were so basic that the court characterized them as “scenes a’faire,” which do not merit copyright protection.¹⁹⁴

B. Copyright/Fair Use

A college’s viewing of a video of a fight and its subsequent distribution to legal counsel was a fair use of a copyrighted work, the Southern District ruled in *Scott v. WorldStarHipHop, Inc.*¹⁹⁵ The copyright claim was appended to plaintiff’s legal challenge to his expulsion from Berkeley College, following a fight in one of the college’s classrooms.¹⁹⁶ The video was captured on a cell phone and posted online.¹⁹⁷ Plaintiff purchased the intellectual property rights for one dollar.¹⁹⁸

Defendant viewed the video, downloaded it, and distributed it

190. *Id.* at *17-18. The court also dismissed claims for intentional infliction of emotional distress and a prima facie tort. *Id.*

191. *See Alexander v. Murdoch*, 2012 U.S. App. LEXIS 23334, at *2-4 (2d Cir. Nov. 14, 2012).

192. *Id.* at *3-4.

193. *Id.* at *4 (quoting *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 49 (2d Cir. 1986); *Warner Bros., Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 242 (2d Cir. 1983)).

194. *Alexander*, 2012 U.S. App. LEXIS 23334, at *4-5 (citing *Hoeling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980)).

195. *See generally* 2011 U.S. Dist. LEXIS 123273 (S.D.N.Y. Oct. 24, 2011).

196. *See id.* at *2-4.

197. *Id.* at *3-4.

198. *Id.* at *22.

using an electronic academic distribution system, Blackboard.¹⁹⁹ The critical media element to this case touched on the video's copyright, but more importantly on whether the college's use was a fair use under the U.S. Copyright Act and thus the case should be dismissed.²⁰⁰

The court analyzed and applied the four prongs of the fair use defense: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the use; and, (4) the effect of distribution upon the market.²⁰¹ Using the copyrighted material as part of a court proceeding or in litigation was a legitimate fair use, the court held.²⁰² The court wrote:

Finally, plaintiff, having lately obtained copyright of the video from its author for \$1, claimed that Berkeley's submission of the video—to defend against plaintiff's complaint—was copyright infringement. In the language of the four-factor test, then, this was (1) a limited, defensive, noncommercial use prompted by plaintiff's commencement of litigation; (2) the work itself is a real-time video of an unchoreographed fight in one of Berkeley's classrooms; (3) the entire video was used; (4) and the submission to NYSDHR could not affect the market for the video, if any.²⁰³

Procedurally, fair use is an affirmative defense, but the Second Circuit has allowed the defense as grounds for dismissal based on a Rule 12(b)(6) motion.²⁰⁴

C. Copyright Preemption

A dispute over a television show treatment, or proposal, was properly pleaded as a contract dispute and was not preempted by the Copyright Act, the Second Circuit ruled in *Forest Park Pictures v. Universal Television Network*.²⁰⁵ This case, which applied California substantive law on contracts, emerged from discussions and an agreement between the actor Hayden Christensen and his brother, Tove, and USA Network, owned by the parent company, Universal Television Network.²⁰⁶

In 2005, the brothers, operating under the company name Forest Park, pitched a treatment for a show called *Housecall*. In the show, a

199. *Id.* at *6.

200. *See Scott*, 2011 U.S. Dist. LEXIS 123273, at *19-24.

201. *Id.* at *20-21 (quoting 17 U.S.C. § 107 (2006)).

202. *Scott*, 2011 U.S. Dist. LEXIS 123273, at *23 (citing 17 U.S.C. § 107).

203. *Scott*, 2011 U.S. Dist. LEXIS 123273, at *22 (citations omitted).

204. *Id.* at *23 (citation omitted).

205. *See* 683 F.3d 424, 435-36 (2d Cir. 2012).

206. *Id.* at 427-28.

doctor, disenfranchised with the medical business, moved to Malibu, California, to become a high-end “‘concierge’ doctor,” a doctor who makes house calls to wealthy Hollywood clients.²⁰⁷ Years after the meetings between Forest Park and the television network, USA Network began airing the television show *Royal Pains*, which is almost identical to *Housecall*.²⁰⁸ The treatment, which included the idea for the show as well as character biographies, themes, and storylines, was mailed to USA Network decision makers and constituted a portion of the contractual agreement between the two parties, the court held.²⁰⁹

The appellate court weighed in on two separate issues: (1) whether state contract law should be applied or whether the matter was preempted by the Copyright Act, and (2) whether a contract did, indeed, exist.²¹⁰ The preemption issue means the federal copyright law will subsume any state law claim if the dispute involves a copyright or the right being asserted is “equivalent to any of the exclusive rights within the general scope of copyright.”²¹¹

The court believed that the *Houscall* treatment was copyrightable.²¹² However, the matter was properly seated as a breach of contract suit because there was an implied promise by USA Network to pay for the use of the idea and the treatment.²¹³ The court then analyzed the agreement between the parties—the promises and consideration—under California law to determine if an implied contract existed and remanded the case.²¹⁴

A bitter dispute between a company and its web designer/video producer/social media manager led to complicated litigation based on both copyright law and a series of unavailing state law claims for conversion in *Ardis Health, LLC v. Nankivell*.²¹⁵ Nankivell, hired by plaintiffs’ companies, produced videos and maintained websites, blogs and social media outlets for plaintiffs’ health and beauty companies.²¹⁶

207. *Id.* at 428.

208. *Id.*

209. *Id.* at 428-29.

210. *Forest Park Pictures*, 683 F.3d at 429. In 2011, the Southern District dismissed the complaint on preemption grounds. *See Forest Park Pictures v. Universal TV Network, Inc.*, 2011 U.S. Dist. LEXIS 50081, *8-9 (S.D.N.Y. May 10, 2011).

211. 17 U.S.C. § 301(b) (2006).

212. *Forest Park Pictures*, 683 F.3d at 430.

213. *Id.* at 432.

214. *See id.* at 432-34, 436.

215. *See Ardis Health, LLC v. Nankivell*, 2011 U.S. Dist. LEXIS 120738, at *2-3, *5-6 (S.D.N.Y. Oct. 19, 2011); *Ardis Health, LLC v. Nankivell*, 2012 U.S. Dist. LEXIS 154839, at *22-23, *30-32 (S.D.N.Y. Oct. 23, 2012).

216. *Ardis Health*, 2011 U.S. Dist. LEXIS 120738, at *2.

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Their contract stated that all work created through the employment would be considered “work for hire” under the Copyright Act and would be the property of plaintiffs’ companies.²¹⁷ The contract also required defendant to return all confidential information upon request.²¹⁸

In addition to the work for hire, the parties entered into a second agreement regarding defendant’s creation of a social media website, “Whatsinurs,” which would be primarily owned by plaintiff and its companies with defendant holding a 5% “founder’s share.”²¹⁹ Defendant’s employment was terminated, prompting defendant to withhold the passwords and other confidential information from plaintiffs, essentially crippling their ability to access and manage their websites.²²⁰ Defendant used content developed in Whatsinurs as part of her personal website, used for marketing purposes.²²¹ In the first lawsuit, which included demands for injunctive relief, the court ordered defendant to turn over the “Access Information.”²²²

Not only was the Access Information plaintiffs’ intellectual property, but defendant’s retention and unauthorized use could be considered harmful.²²³ The court wrote:

Plaintiffs depend heavily on their online presence to advertise their businesses, which requires the ability to continuously update their profiles and pages and react to online trends. The inability to do so unquestionably has a negative effect on plaintiffs’ reputation and ability to remain competitive, and the magnitude of that effect is difficult, if not impossible, to quantify in monetary terms. Such injury constitutes irreparable harm.²²⁴

Efforts to restrain defendant from exhibiting the work on her own website were inappropriate and even “preposterous on its face,” the court ruled.²²⁵ There was no irreparable harm when a web search directed viewers to defendant’s web marketing website which exhibited the Whatsinurs website for marketing purposes.²²⁶

The court wrote:

217. *Id.* at *3.

218. *Id.*

219. *Id.* at *4.

220. *Id.* at *4-5.

221. *Ardis Health*, 2011 U.S. Dist. LEXIS 120738, at *5.

222. *Id.* at *6-7.

223. *Id.* at *7.

224. *Id.*

225. *Id.* at *12.

226. *Ardis Health*, 2011 U.S. Dist. LEXIS 120738, at *11-14.

Not only do defendant's websites appear below plaintiffs' in search results, defendant's do not purport to be, or in any way give the impression of being, portals for the sale of commercial goods. On both of defendant's websites, the Whatsinurs content is wholly non-functional, little more than dressed-up image captures. It is clearly labeled as an example of defendant's 'Design' capabilities and surrounded by content from other projects defendant has worked on. It does not compete with plaintiffs' websites or pose potential issues of confusion.²²⁷

In a separate opinion, a counterclaim for conversion of intellectual property was preempted by the Copyright Act and was dismissed.²²⁸ Here, among Nankivell's claims in her counterclaim, she argued that the plaintiffs illegally converted her intellectual property, the Whatsinurs website, which included web domain registration and trademark and copyright applications.²²⁹

The state law tort of conversion was the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights."²³⁰ However, conversion, because of its structural similarity to copyright infringement, is preempted by the Copyright Act, the court held:²³¹

In other words, Nankivell asserts protectable interests in a copyrighted work (the website and its content) that allegedly belong to her by virtue of authorship. Among the rights Nankivell seeks to protect is her ability to display the work to the public. This claim falls squarely within the general ambit of federal copyright law.²³²

D. Copyright Jurisdiction

The jurisdictional legal wrangling in the copyright case *Penguin Group (USA) Inc. v. American Buddha* dragged on for the third *Survey* year in a row.²³³ The Second Circuit again ruled on this copyright

227. *Id.* at *12-13.

228. *Ardis Health, LLC v. Nankivell*, 2012 U.S. Dist. LEXIS 154839, at *2 (S.D.N.Y. Oct. 23, 2012).

229. *Id.* at *7.

230. *Id.* at *26 (quoting *Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 403-04 (2d Cir. 2006)). Broken down, conversion requires proof of four elements: (1) that a party acted without authorization; (2) that a party exercised dominion or a right of ownership over property belonging to another; (3) that the rightful owner made a demand for the property; and (4) that the demand was rejected. *Ardis Health*, 2012 U.S. Dist. LEXIS 154839, at *31 (citation omitted).

231. *Ardis Health*, 2012 U.S. Dist. LEXIS 154839, at *26-27.

232. *Id.* at *27-28.

233. *See generally* 640 F.3d 497 (2d Cir. 2011). This case was addressed in detail in this *Survey* for the past two years. *See* Roy S. Gutterman, *Media Law, 2010-11 Survey of*

dispute after the New York Court of Appeals certified the question of whether the case was properly situated in New York State.²³⁴ This case involved an Arizona-based company that maintained a website that provided online access to classical literature, including books published by plaintiff, a New York-based publishing company.²³⁵ The heart of plaintiff's case is that defendant infringed on its protected copyrights by posting its books on the site.²³⁶

The courts had been called to analyze New York's long-arm statute, CPLR 302(a)(3)(ii).²³⁷ To establish jurisdiction, the statute requires that plaintiff demonstrate that: (1) the tortious action was committed outside New York; (2) the cause of action arose from this tortious action; (3) the tortious action caused injury to a person or property in New York; (4) defendant expected or should have reasonably expected the action would have consequences in New York; and (5) defendant derives substantial revenue from interstate or international commerce.²³⁸

Focusing on the third prong, the Second Circuit wrote, "[t]he Court of Appeals' decision now compels us to 'agree with Penguin' and to conclude, for the purposes of the personal jurisdiction analysis pursuant to New York's long-arm statute, that the situs of Penguin's alleged injury was New York."²³⁹

The Second Circuit gave weight to the Court of Appeals' discussion of the implications of the internet in this case.²⁴⁰ Even though jurisdiction for disputes arising on the internet, even in copyright claims, can sometimes raise murky questions about jurisdiction, the court noted that the alleged infringement arose because the alleged piracy emerged from an online site.²⁴¹

An infringement claim against 240 unnamed potential defendants

New York Law, 62 SYRACUSE L. REV. 739, 754-55 (2012); Roy S. Gutterman, *Media Law, 2009-10 Survey of New York Law*, 61 SYRACUSE L. REV. 879, 900-01 (2011) [hereinafter *2009-10 Survey*].

234. *Penguin Grp.*, 640 F.3d at 498; *see also generally* *Penguin Grp. (USA) Inc. v. Am. Buddha*, 16 N.Y.3d 295, 946 N.E.2d 159, 921 N.Y.S.2d 171 (2011).

235. *Penguin Grp.*, 640 F.3d at 498 (citation omitted).

236. *Id.* at 498 n.3 (noting that the books at issue were: *Oil!* by Upton Sinclair, *It Can't Happen Here* by Sinclair Lewis, *The Golden Ass* by Apuleius, and *On the Nature of the Universe* by Lucretius).

237. *Id.* at 498-99 (citing N.Y. C.P.L.R. 302(a)(3)(ii) (McKinney 2013)).

238. *Penguin Grp.*, 640 F.3d at 499 (citations omitted).

239. *Id.* at 501.

240. *Id.* at 500 (citing *Penguin Grp. (USA) Inc. v. Am. Buddha*, 16 N.Y. 3d 295, 304, 946 N.E.2d 159, 163, 921 N.Y.S.2d 171, 175 (2011)).

241. *Penguin Grp.*, 64 F.3d at 500 (citing *Penguin Grp.*, 16 N.Y.3d at 305, 946 N.E.2d at 164, 921 N.Y.S.2d at 176).

accused of illegally downloading and sharing an online pornographic video was not properly seated in federal court in New York.²⁴² The suit also failed to establish a prima facie case for personal jurisdiction in order to compel internet service providers to reveal the identities of the users via their IP addresses.²⁴³

E. Copyright Miscellaneous

A dispute in a Russian film translation and DVD distribution case was not a direct or contributory infringement case, the Second Circuit ruled.²⁴⁴

F. Trademark

New York City's demi-celebrity, the Naked Cowboy, filed an extensive trademark infringement and misappropriation claim against CBS television and the producers of the soap opera, *The Bold and the Beautiful*, in *Naked Cowboy v. CBS*.²⁴⁵ The Naked Cowboy is a Times Square fixture; he greets tourists and sings songs while playing a guitar, wearing only underwear, cowboy boots, and a cowboy hat.²⁴⁶ Plaintiff possesses a registered trademark, sells a range of merchandise, and aggressively polices his image and likeness.²⁴⁷

The claims originated from two incidents: a scene in the show featuring a character named Oliver dressed only in his underwear, cowboy boots, and cowboy hat singing while playing a guitar, which was broadcast in an episode and a weekly recap; and a YouTube posting of this same scene with the tag "The Bold and the Beautiful—Naked Cowboy."²⁴⁸ CBS estimated that more than 3 million viewers tuned-in to see the broadcast and the weekly recap.²⁴⁹ Plaintiff argued that the financial support and revenue generated by advertisers made defendant's use an improper commercial use.²⁵⁰

All nine claims—which were vested in trademark infringement,

242. See *DigiProtect USA Corp., v. John/Jane Does 1-240*, 2011 U.S. Dist. LEXIS 109464, at *1 (S.D.N.Y. Sept. 26, 2011).

243. *Id.* at *7-8.

244. *Russian Entm't Wholesale, Inc. v. Close-Up Int'l, Inc.*, 482 F. App'x 602, 606 (2d Cir. 2012) (citing *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 931 (2005)).

245. 844 F. Supp. 2d 510, 512-13 (S.D.N.Y. 2012).

246. *Id.* at 513.

247. *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 448, 458 (S.D.N.Y. 2008) (dismissing claims for infringement).

248. *Naked Cowboy*, 844 F. Supp. 2d at 513.

249. *Id.*

250. *Id.*

unfair competition, dilution of trademark, and several state law claims for misappropriation—were dismissed on defendants’ Rule 12(b)(6) motion.²⁵¹ The court analyzed the five factors for trademark infringement: (1) a valid registered mark; (2) defendant’s use of the mark; (3) in commerce; (4) in connection with the sale or advertising of goods or services; and (5) without plaintiff’s consent.²⁵²

Summarizing its application, the court wrote:

‘Naked cowboy’ is a registered mark and Plaintiff is thus afforded trademark rights in the phrase. However, there could have been no infringement of those rights if Defendants did not make use of the word mark in commerce None of the contents of the Episode could have violated Plaintiff’s trademark rights because the word mark ‘Naked Cowboy’ does not appear anywhere in it. Similarly, inclusion of ‘naked’ and ‘cowboy’ as separate tags associated with the YouTube video clip is not ‘use’ of Plaintiff’s word mark ‘Naked Cowboy.’²⁵³

Furthermore, the court held that defendants did not make a commercial use of any registered marks and had no relation to plaintiff’s commercial or artistic enterprises.²⁵⁴

IX. FREEDOM OF INFORMATION

The Court of Appeals denied a historian’s Freedom of Information Law (“FOIL”) request for documents relating to transcripts of fifty-year-old government investigations of accused communists in *Harbatkin v. New York City Department of Records and Information Services*.²⁵⁵ One of the seven exceptions to FOIL is based on whether disclosure would subject a party to an unwarranted invasion of privacy.²⁵⁶ Acknowledging that the passage of time has mitigated much of the privacy concerns for those interviewed by the New York City Board of Education, the Court deemed that redacted documents would be sufficient to meet FOIL.²⁵⁷ The government’s promise of confidentiality trumped the interest in disclosing the complete

251. *Id.* at 514.

252. *Id.* at 514-15 (citing 15 U.S.C. §§ 1124, 1125(a), (c) (2006); 1-800 Contacts, Inc. v. Whenu.com, Inc., 414 F.3d 400, 406-07 (2d Cir. 2005)).

253. *Naked Cowboy*, 844 F. Supp. 2d at 515 (citation omitted).

254. *Id.* at 516.

255. 19 N.Y.3d 373, 377, 380, 971 N.E.2d 350, 351-52, 948 N.Y.S.2d 220, 221-22 (2012).

256. *Id.* at 380, 971 N.E.2d at 352, 948 N.Y.S.2d at 222 (citation omitted).

257. *Id.*, 971 N.E.2d at 353, 948 N.Y.S.2d at 223 (analyzing N.Y. PUB. OFF. LAW § 87(2) (McKinney 2012)).

documents.²⁵⁸

Although time has taken the sting out of the label of “communist,” and decades have passed since many of the interviews took place, the Court still ruled that the promise investigators made to interviewees trumped the importance of opening up the complete historical record to public scrutiny.²⁵⁹

The Court wrote:

We find it unacceptable for the government to break that promise, even after all these years. We quoted earlier in this opinion from an interview of a teacher who feared that her son might learn she was being questioned about Communist activities. It is unlikely that she is still alive—the interview shows her teaching career began in 1934 or earlier—but her son may be. The risk that he would be hurt or embarrassed by learning now of his mother’s interview may be small, but representatives of New York City’s government solemnly assured her that the government would not subject him to that risk. Perhaps there will be a time when the promise made to her, and to others similarly situated, is so ancient its enforcement would be pointless, but that time is not yet.²⁶⁰

X. BROADCAST INDECENCY

The Second Circuit’s ruling on broadcast indecency standards with regard to “spontaneous fleeting expletives” was kicked back to the lower court by the United States Supreme Court in *Federal Communications Commission v. Fox Television Stations*.²⁶¹ The United States Supreme Court found that the agency’s new standards for broadcasting indecent content were promulgated without due process.²⁶²

Though the Court avoided deciding the case on First Amendment grounds, Justice Kennedy wrote: “[w]hen speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech. These concerns are implicated here because, at the outset, the broadcasters claim they did not have, and do not have, sufficient notice of what is proscribed.”²⁶³

Justice Ginsburg wrote a terse and compelling concurring opinion

258. *Harbatkin*, 19 N.Y.3d at 380, 971 N.E.2d at 353, 948 N.Y.S.2d at 223.

259. *Id.* at 380-81, 971 N.E.2d at 353, 948 N.Y.S.2d at 223.

260. *Id.*

261. 132 S. Ct. 2307, 2320 (2012). The facts of this case and its previous dispositions were addressed in previous *Survey* articles. See 2009-10 *Survey*, *supra* note 233, at 902-03; Roy S. Gutterman, *Media Law*, 2006-07 *Survey of New York Law*, 58 SYRACUSE L. REV. 1075, 1095-97 (2008).

262. *Fox Television Stations*, 132 S. Ct. at 2320.

263. *Id.* at 2317.

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questioning the relevance and appropriateness of the underlying precedent from *Federal Communications Commission v. Pacifica Foundation*.²⁶⁴

264. *Id.* at 2321 (Ginsburg, J., concurring). (citing *Pacifica Found.*, 438 U.S. 726 (1978))