

MEDIA LAW

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INTRODUCTION

This year’s *Survey* covers a range cases involving media defendants in newspapers, magazines, television stations, and websites—online magazines, gripe websites, and online entities for traditional media enterprises. Defamation and invasion of privacy cases cover the mundane to the extreme, with allegations and accusations of infidelity, dishonesty, incompetence, even placing a severed horse head in a pool. These cases examine the sometimes precarious position media play and the liability these enterprises encounter every day in disseminating news, information, and entertainment.

I. DEFAMATION – ELEMENTS

A reasonable reader could not conclude that generalized statements

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were not sufficiently about the plaintiff, an insurance company executive who worked for a company that had been investigated and sanctioned by then-New York Attorney General Eliot Spitzer, the Second Circuit ruled in *Gilman v. Spitzer*.¹ Spitzer's column on *Slate*, an online magazine, under the headline, "They Still Don't Get It," pointed to investigations and prosecutions he spearheaded as New York's Attorney General, and was a response to a *Wall Street Journal* editorial criticizing his record with the insurance industry.²

Although the column referred to a specific company, plaintiff was never specifically mentioned in the column.³ The column also explicitly stated that plaintiff's conviction had been vacated.⁴ Plaintiff argued that a knowledgeable reader would associate the comments in the column with plaintiff, thus, giving the impression that he was involved in criminal activity.⁵ However, "[a] reasonable reader could not conclude that the challenged statements were 'of and concerning' Gilman."⁶ Without explicitly naming plaintiff and the broad nature of the statements in the column, the complaint failed to satisfy the "of and concerning" prong of defamation.⁷

The court wrote:

Gilman argues that knowledgeable readers would immediately tie these statements to him, given the allegations leveled against him during Spitzer's investigation of Marsh. However, the opposite conclusion is true: readers aware that Gilman's conviction had been vacated would be *less* likely to believe that he was one of the employees Spitzer referenced. Given the numerous linguistic and logical flaws with Gilman's claim, we determine that the challenged statements cannot reasonably be understood to be "of and concerning" him.⁸

Anonymous postings on a blog about local government alleging that a local businessman had put a severed horse's head in a government official's pool may satisfy elements of libel per se, the appellate

1. No. 12-4169-CV, 2013 U.S. App. LEXIS 19360 (2d Cir. 2013). This case technically falls outside this year's *Survey* date parameters of July 1, 2012, to June 30, 2013. The district court opinion fell within the *Survey* period. *Gilman v. Spitzer*, 902 F. Supp. 2d 389 (S.D.N.Y. 2012).

2. *Gilman*, No. 12-4169-CV, 2013 U.S. App. LEXIS, at *2.

3. *Id.*

4. *Id.* at *4.

5. *Id.* at *5.

6. *Id.* at *4.

7. *Gilman*, No. 12-4169-CV, 2013 U.S. App. LEXIS, at *5.

8. *Id.*

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division ruled in *LeBlanc v. Skinner*.⁹

This opinion delved into both procedural and substantive matters. Procedurally, the court looked at the appropriate statute of limitations¹⁰ and the relation-back doctrine to overcome the statute of limitations with multiple tortfeasors.¹¹ This case involved multiple defendants, including a married couple intricately involved in local politics in Wawayanda, Orange County, and their nephew, who was named as a defendant and admitted to posting the allegedly defamatory comments under pseudonyms for defendants at their behest.¹²

The most substantive portion of the opinion involved the online comments posted on the blog: 1) calling plaintiff a “terrorist”¹³ and 2) whether publishing allegations that plaintiff was responsible for placing a severed horse’s head in an official’s pool could be susceptible of defamatory meaning, particularly as defamation per se.¹⁴

The court acknowledged that internet forums and venues focusing on public debate and public issues sometimes include anonymous speakers who may engage in “rhetorical hyperbole” and level “vigorous epithet[s].”¹⁵ Thus, labeling plaintiff a “terrorist” should not be actionable because it would be a statement of pure opinion.¹⁶ “This conclusion is especially apt in the digital age, where it has been commented that readers give less credence to allegedly defamatory Internet communications than they would to statements made in other milieus,” the court wrote.¹⁷

The second defamatory issue, regarding the severed horse head, was more nuanced, with the court dropping a footnote to the action’s literary and popular cultural connotations.¹⁸ The identity of who placed

9. 103 A.D.3d 202, 955 N.Y.S.2d 391 (2d Dep’t 2012).

10. *Id.* at 208, 955 N.Y.S.2d at 396 (ruling the statute of limitations had not expired even though plaintiff had to initially file the complaint with several John Doe defendants before ascertaining the identities of the pseudonyms defendants posted under on the blogs; plaintiff satisfied N.Y. Civil Practice Law and Rules (“CPLR”) section 203(c) by relating the complaint back to defendants and properly amending the complaint to name defendants upon learning their identity through discovery).

11. *Id.* at 208-11, 955 N.Y.S.2d at 397-98 (applying CPLR section 203(b), uniting additional defendants within the statutory period).

12. *Id.* at 204-05, 955 N.Y.S.2d at 394.

13. *Id.* at 213, 955 N.Y.S.2d at 400.

14. *LeBlanc*, 103 A.D.3d at 213-14, 955 N.Y.S.2d at 400.

15. *Id.* at 213, 955 N.Y.S.2d at 400.

16. *Id.*

17. *Id.* (citing *Sandals Resorts Int’l. Ltd. v. Google, Inc.*, 86 A.D.3d 32, 43-44, 925 N.Y.S.2d 407, 416 (2011)).

18. *Id.* at 205, 955 N.Y.S.2d at 394 (referring to Francis Ford Coppola’s iconic film adaptation of Mario Puzo’s novel, *The Godfather*).

the horse head in a town board member's pool was not determined, the court noted.¹⁹ But it was determined that statements published on the community blog naming plaintiff as the culprit were attributed to defendants Wayne and Karen Skinner.²⁰ The trial court had dismissed the causes of action on a substantive technicality regarding defamation law and a need to plead special damages.²¹ But the appellate division believed that this sufficiently imputed criminal activity.²² The court wrote:

The published allegation that the plaintiff put a severed horse head in a Town Board member's swimming pool constituted defamation per se under this standard and, therefore, did not require the plaintiff to plead special damages. Moreover, the accusation that the plaintiff placed a horse head in a political rival's pool, if true, describes conduct that would constitute serious crimes. A false allegation that a person committed a serious crime is also a ground for asserting a cause of action to recover damages for defamation per se²³

Though the appellate division did not indicate the content of the alleged defamatory statement at issue in the case, its opinion reiterated the black letter law on the tort in *Zherka v. Gribler*.²⁴ A plaintiff must plead special damages, or specific economic loss, in one of the four categories of libel per se, which are: (1) imputing serious crime; (2) statements that injure plaintiff's in business or trade; (3) a loathsome disease; or (4) unchastity of a woman.²⁵ In this case, the appellate division held that plaintiff failed to plead special damages and the alleged statements did not properly impute criminal activity.²⁶

Stories in a weekly newspaper accusing a local politician of stealing political campaign signs was not libel per se because it did not impute a serious crime, a county court ruled.²⁷ One category of libel per se is falsely imputing commission of a serious crime.²⁸ Stealing political campaign signs, while not a flattering allegation, is a

19. *LeBlanc*, 103 A.D.3d at 205, 955 N.Y.S.2d at 394.

20. *Id.* at 205-07, 955 N.Y.S.2d at 395-96.

21. *Id.* at 214, 955 N.Y.S.2d at 401.

22. *Id.*

23. *Id.* (citations omitted).

24. 101 A.D.3d 864, 954 N.Y.S.2d 893 (2d Dep't 2012).

25. *Id.* at 864, 954 N.Y.S.2d at 893 (citing *Lieberman v. Gelstein*, 80 N.Y.2d 429, 435, 605 N.E.2d 344, 347, 590 N.Y.S.2d 857, 860 (1992)).

26. *Id.* at 865, 954 N.Y.S.2d at 893.

27. *Huffine v. South Shore Press*, No. 11-17764, 2012 N.Y. Slip Op. 30169(U), at 6 (Sup. Ct. Suffolk Cnty. 2012).

28. *Id.* (citing *Lieberman*, 80 N.Y.2d at 429, 605 N.E.2d at 344, 590 N.Y.S.2d at 857).

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misdeemeanor, falling well short of an indictable crime, the court held.²⁹ The court wrote: “It does not appear to the [c]ourt 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.”³⁰

The court also posited a second ground for dismissing the claim for a second story because allegations associated with the headline—“Residents outraged over Huffine’s candidacy”—could not be defamatory because it was pure opinion.³¹ The court wrote: “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.”³²

The wife of the late fashion designer Oleg Cassini failed to state a viable cause of action for both defamation and intentional infliction of emotional distress following an article in the magazine *Vanity Fair*.³³ The court was unable to find defamatory meaning to statements published in the magazine regarding plaintiff’s credentials and value to the fashion industry, disrespectful comments by her stepdaughters, and statements about her husband’s extra-marital affairs.³⁴ The court also noted that plaintiff declined to be interviewed for the article.³⁵

Plaintiff failed to prove any elements of defamation law and was particularly unable to pinpoint specific monetary loss.³⁶ “[P]laintiff alleges that defendants’ defamation caused her to lose business opportunities. While damages are presumed for libel tending to injure plaintiff’s business or profession, plaintiff does not identify her business or profession, and none of the statements impugns her business performance,” the court wrote.³⁷

The intentional infliction of emotional distress (“IIED”) and negligent infliction of emotional distress (“NIED”) claims, the court

29. *Id.*

30. *Id.*

31. *Id.* at 14 (citing *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 283, 501 N.E.2d 550, 550, 508 N.Y.S.2d 901, 901 (1986)).

32. *Huffine*, No. 11-17764, 2012 N.Y. Slip Op. 30169(U), at 16 (citing 600 W. 115th St. Corp. v. Von Gutfuld, 80 N.Y.2d 130, 130, 603 N.E.2d 930, 930, 589 N.Y.S.2d 825, 825 (1992)).

33. *Cassini v. Advance Publishers, Inc.*, No. 108971/11, 2013 N.Y. Slip Op. 51553(U), at 1 (Sup. Ct. N.Y. Cnty. 2013).

34. *Id.* at 2-3.

35. *Id.* at 3 (citing *Sprewell v. NYP Holdings, Inc.*, 43 A.D.3d 16, 21, 841 N.Y.S.2d 7, 11 (1st Dep’t 2007)).

36. *Id.*

37. *Id.* (citations omitted).

held, were simply “duplication of her libel claim.”³⁸ The court laid out the prima facie elements of the IIED claim: 1) extreme and outrageous conduct by defendant; 2) with intent to cause or in disregard of substantial probability that conduct would cause severe emotional distress; 3) a causal connection between the acts and plaintiff’s injury; and 4) severe emotional distress.³⁹ Further, a plaintiff must show that the conduct was “extreme and outrageous . . . and beyond all possible bounds of decency and utterly intolerable in a civilized community.”⁴⁰ “Simply stated, defendants’ publication of the article about plaintiff is not extreme and outrageous conduct,” the court held.⁴¹

The brother of a police officer accused of racist misconduct in a prosecution who was misidentified in a newspaper photograph and also branded a racist satisfied prima facie elements to overcome a newspaper’s motion to dismiss, a Richmond County court ruled.⁴² Plaintiff was depicted in a newspaper photograph holding a jacket over his sister’s head as they exited a courthouse following proceedings for plaintiff’s brother.⁴³ *The New York Post’s* headline read “Racist cop in civil-rights rap; Nailed for bogus bust on black man,” and the caption read “Coverup: A relative of alleged rogue cop Michael Daragjati tries to hide her face from photographers yesterday as she leaves his arraignment hearing in Brooklyn federal court.”⁴⁴

Because plaintiff was deemed a private figure, the court believed he sufficiently pled negligence or gross irresponsibility in publishing the defamatory photo and caption.⁴⁵ Though the statements did not fit snugly into one of the categories of libel per se, the court still felt the statements could cause harm to plaintiff’s reputation—inducing an evil opinion of him in the minds of right-thinking persons or causing him to be shunned or avoided by parts of the community.⁴⁶

The court wrote:

If the words used in the communication, tested by their effect upon the average reader, are not reasonably susceptible of a defamatory

38. *Cassini*, No. 108971/11, 2013 NY Slip Op. 51553(U), at 4.

39. *Id.* at 3-4.

40. *Id.* at 4 (citations omitted).

41. *Id.*

42. *Daragjati v. NYP Holdings, Inc.*, No. 101874/12, 2013 N.Y. Slip Op. 50171(U), at 1 (Sup. Ct. Richmond Cnty. 2013).

43. *Id.*

44. *Id.*

45. *Id.* at 8.

46. *Id.* at 5 (citing *Ava v. NYP Holdings, Inc.*, 64 A.D.3d 407, 412, 885 N.Y.S.2d 247, 251 (1st Dep’t 2009)).

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meaning, they are not actionable and cannot be made so by a strained or artificial construction. However, if the contested statements are reasonably susceptible of a defamatory connotation, then it becomes the jury's function to say whether that was the sense in which the words were likely to be understood by the ordinary and average reader.⁴⁷

In its motion to dismiss, the newspaper challenged the defamatory meaning of the published material, which the court said could be libel per quod and a matter for jury consideration.⁴⁸

A lawyer's far-reaching defamation and other torts lawsuit against fifty-nine media and web-based defendants was dismissed by a state court for a variety of substantive, privilege, and procedural reasons in *Rakofsky v. Washington Post*.⁴⁹ The case, which had its roots in newspaper coverage of plaintiff's unsuccessful representation of a murder suspect in Washington, D.C. (which was declared a mistrial), generated widespread media coverage, especially in the legal blogosphere.⁵⁰ The judge in the underlying case made comments about plaintiff's inexperience as a trial lawyer for a murder case and declared a mistrial after plaintiff's client asked for new counsel.⁵¹

Because the judge's comments were part of an official trial proceeding, they were considered privileged under Civil Rights Law section 74, known as the fair report privilege.⁵² The court also considered some published statements as pure opinion and others as non-defamatory, and many defendants felt they should not have been dragged into New York courts as out-of-state parties.⁵³

The court also accepted some defendants' argument based on the republication "wire service defense" because of some of the republished facts and details initially reported in *The Washington Post* stories.⁵⁴ "These defendants were entitled to rely upon the research and reporting of *The Washington Post*, a reputable news agency, which was clearly a

47. *Daragjati*, No. 101874/12, 2013 N.Y. Slip Op. 50171(U), at 7 (citations omitted).

48. *Id.* at 8-9.

49. No. 105573/11, 2013 N.Y. Slip Op. 50739(U) (Sup. Ct. N.Y. Cnty. 2013) (unpaginated).

50. *Id.* Some commentators referred to the case as "Rakofsky versus the Internet." See Mike Masnick, *Judge Not Impressed by Rakofsky v. The Internet; Dismisses Defamation Claims*, TECHDIRT (May 10, 2013, 6:51 PM), <http://www.techdirt.com/articles/20130510/17292223040/judge-not-impressed-rakofsky-v-internet-dismisses-defamation-claims.shtml>.

51. *Rakofsky*, No. 105573/11, 2013 N.Y. Slip Op. 50739(U).

52. *Id.*

53. *Id.*

54. *Id.*

substantially accurate report,” the court wrote.⁵⁵

Other statements, the court held, were dismissed because they were deemed expressions of pure opinion.⁵⁶ Additionally, the court also dismissed IIED, intentional interference with contract, invasion of privacy, and prima facie tort claims.⁵⁷ Some defendants filed motions for sanctions arguing the case was frivolous, but the court denied this, too.⁵⁸

A television report implying that brothers of a man indicted for traveling to Yemen to join al-Qaeda had terroristic ties could be defamatory, a state supreme court held.⁵⁹ The court denied the television station’s pre-answer motion to dismiss because the allegations may subject plaintiffs to hatred, contempt, public disgrace, or humiliation or otherwise harm their reputations.⁶⁰ Specifically, the court wrote:

A jury can find the subject news story, with its juxtaposition of aural and visual imagery, creates the portrayal of plaintiffs as Middle Eastern terrorists. The subject news story contains mug-shot like photographs of plaintiffs in relation to wiring money overseas against images of court documents and courtroom sketches relating to plaintiffs’ indicted brother. This meets the defamation standard as set above⁶¹

The court must look at the context of the statements in their entirety and consider how the average viewer or reader may view the material.⁶² The court added:

The sequence of cuts in the subject news story could implant in the minds of the average viewer that plaintiffs and their indicted brother all engaged in terrorist activities, including wiring money abroad, and that the once friendly relationship plaintiffs had with their neighbors in Bath Beach has turned to suspicion, fear and mistrust.⁶³

A series of television news about organized crime’s ties to strip

55. *Id.*

56. *Rakofsky*, No. 105573/11, 2013 N.Y. Slip Op. 50739(U).

57. *Id.*

58. *Id.*

59. *Elhanafi v. Fox Television Stations, Inc.*, No. 9722/11, 2012 N.Y. Slip Op. 52303(U), at 3-4 (Sup. Ct. Kings Cnty. 2012).

60. *Id.*

61. *Id.* at 15 (citing *Dillon v. City of New York*, 261 A.D.2d 34, 38, 704 N.Y.S.2d 1, 5 (1st Dep’t 1999)).

62. *Id.* (quoting *Aronson v. Wiersma*, 65 N.Y.2d 592, 594, 483 N.E.2d 1138, 1139, 493 N.Y.S.2d 1006, 1007 (1985)).

63. *Id.* at 16.

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clubs in New York City, Queens, and Long Island did not name or sufficiently tie plaintiff to any false and defamatory statements.⁶⁴ Plaintiff failed to satisfy the tort's "of and concerning prong."⁶⁵ "The challenged reports do not state that all or even any employees of Cheetah's are members of organized crime, much less that employees of unnamed affiliated companies are members of organized crime, or that they were individually promoting a human trafficking scheme," the court wrote.⁶⁶

A state court judge's libel suit against *The New York Daily News* for stories accusing him of corruption were dismissed because plaintiff could not prove the stories were false and published with actual malice.⁶⁷

A book about the 2007 financial crisis, which included a chapter profiling finance professional and business owner Wing Chau, was not defamatory, the court wrote in *Chau v. Lewis*.⁶⁸ Plaintiff leveled a complaint citing twenty-six defamatory passages in the book, *The Big Short*, by well-established non-fiction writer Michael Lewis.⁶⁹ The court, however, methodically went through each allegation, dismissing the suit and ruling that some claims were statement of opinion,⁷⁰ some were substantially true,⁷¹ some were not of and concerning plaintiff,⁷² and some lacked defamatory meaning.⁷³

II. DEFAMATION – PUBLIC/PRIVATE FIGURE/ACTUAL MALICE

A prominent journalist who injected herself into "the sphere of [a] legitimate public concern" should be treated as a limited purpose public figure in her defamation suit against her critics, the appellate division held in *Farber v. Jeffreys*.⁷⁴ Because plaintiff was an award-

64. *Three Amigos SJL Rest., Inc. v. CBS News, Inc.*, No. 152184/12, 2013 N.Y. Slip Op. 3108(U), at 2-3, 10-11 (Sup. Ct. N.Y. Cnty. 2013).

65. *Id.* at 11-12.

66. *Id.* at 11.

67. *Martin v. Daily News LP*, No. 100053/08, 2012 N.Y. Slip Op 52230(U), at 1-2, 9 (Sup. Ct. N.Y. Cnty. 2012).

68. 935 F. Supp. 2d 644, 652, 662 (S.D.N.Y. 2013).

69. *Id.* at 651-53.

70. *Id.* at 657.

71. *Id.* at 662.

72. *Id.* at 664.

73. *Chau*, 935 F. Supp. 2d at 665.

74. 103 A.D.3d 514, 515, 959 N.Y.S.2d 486, 487 (1st Dep't 2013) (quoting *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 572, 379 N.Y.S.2d 61, 64 (1975)). For a comprehensive recitation of the facts of the case and the underlying dispute, see *Farber v. Jeffreys*, No. 106399/09, 2013 N.Y. Slip Op. 51966(U)

winning journalist who voluntarily injected herself into the debate and discussion surrounding HIV/AIDS with the intent to influence public policy, she should be held to the higher standard of proving either actual malice or gross irresponsibility.⁷⁵ Additionally, the court found plaintiff to be “a contentious figure” in the HIV/AIDS community.⁷⁶

The trial court properly dismissed the claims because there was no evidence that the statements were published with actual malice or gross irresponsibility, even though they apparently included misquotes and plaintiff argued defendant had a bias against her.⁷⁷ Statements were published in an online venue and were subject to the same protection as traditional media, the court added.⁷⁸ “The record was devoid of evidence that Jeffreys acted with knowledge that his statements were false or with reckless disregard for the truth, or that he did not follow the standards of information gathering employed by reasonable persons,” the court wrote.⁷⁹

Allegations that a high school English teacher and department head misused funds may have been partially true and partially false, but were not published with gross negligence, an appellate court ruled in *Matovcik v. Times Beacon Record Newspapers*.⁸⁰ Nevertheless, the stories covered matters of public interest and the reporter “did not act in a grossly irresponsible manner while gathering and verifying information for the article.”⁸¹

A photograph with a caption alluding to a child’s involvement with gang activity could have defamatory meaning, the appellate division ruled in *Knutt v. Metro International*.⁸² Plaintiff, a ten-year-old child, had been photographed while looking at a crime scene in Brooklyn.⁸³ The photograph was included in a newspaper story about gang-related crime in the Bronx under the headline, “Call to Get Tougher on Gang Activities.”⁸⁴

A trial court initially dismissed a defamation suit by plaintiff’s

(Sup. Ct. N.Y. Cnty. 2011).

75. *Farber*, 103 A.D.3d at 515, 959 N.Y.S.2d at 487.

76. *Id.* at 514, 959 N.Y.S.2d at 487.

77. *Id.* at 515-16, 959 N.Y.S.2d at 487-88.

78. *Id.* at 516, 959 N.Y.S.2d at 488.

79. *Id.* at 515, 959 N.Y.S.2d at 487.

80. 108 A.D.3d 511, 512, 968 N.Y.S.2d 559, 561 (2d Dep’t 2013); *see Matovcik v. Times Beacon Record Newspapers*, No. 04-12283, 2012 N.Y. Slip Op. 33176(U), at 2 (Sup. Ct. Suffolk Cnty. 2012).

81. *Matovcik*, 108 A.D.3d at 512, 968 N.Y.S.2d at 561.

82. 91 A.D.3d 915, 917, 938 N.Y.S.2d 134, 137 (2d Dep’t 2012).

83. *Id.* at 915, 938 N.Y.S.2d at 136.

84. *Id.*

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parents pursuant to Civil Practice Law and Rules (“CPLR”) 3211(a)(7).⁸⁵ The appellate court felt there were sufficient matters of fact for jury consideration, particularly whether the newspaper published a harmful false statement of fact with a degree of gross irresponsibility.⁸⁶

“Here, the subject news article, considered as a whole, is reasonably susceptible of a defamatory connotation concerning the infant plaintiff and, thus, it is a question for the jury whether the ordinary and average reader would understand the meaning as such,” the court held.⁸⁷

The court acknowledged that the photograph was a matter of public interest, but involved an admittedly private figure, triggering the “gross irresponsibility” standard.⁸⁸ Because the matter was dismissed at the pleading stage, plaintiff was denied the opportunity to engage in discovery to ascertain whether the newspaper acted with gross irresponsibility.⁸⁹ “[T]he plaintiffs have no knowledge of, and cannot possibly plead, any factual allegations concerning Metro’s methods for gathering information, researching, writing and editing the subject article,” the court wrote.⁹⁰

A trial court held a private school principal to be a limited purpose public figure in his libel suit against a newspaper which had published two stories calling him a racist, specifically naming him “Principal of Hate” and “[a] firebrand educator with ties to a white supremacist group,” in *Borzellieri v. Daily News, LP*.⁹¹ In determining plaintiff’s standing as a public figure, the court applied four criteria: (1) plaintiff successfully drew public attention to his views in order to influence others prior to the subject of the litigation; (2) plaintiff voluntarily injected himself into a public controversy prior to the litigation; (3) plaintiff assumed a position of prominence in the public controversy; and (4) plaintiff maintained regular and continued access with the media.⁹²

85. *Id.*

86. *Id.* at 916, 938 N.Y.S.2d at 137.

87. *Knutt*, 91 A.D.3d at 916, 938 N.Y.S.2d at 137.

88. *Id.* (quoting *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 572, 379 N.Y.S.2d 61, 64 (1975)).

89. *Id.* at 916-17, 938 N.Y.S.2d at 137.

90. *Id.* at 917, 938 N.Y.S.2d at 137.

91. No. 11731/12, 2013 N.Y. Slip Op. 50624(U), at 1, 1, 11 (Sup. Ct. Queens Cnty. 2013).

92. *Id.* at 8-9 (citing *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136-37 (2d Cir. 1984)).

Plaintiff was a principal in a private Catholic school and author of two controversial books on race.⁹³ “Borzellieri became a public figure by publishing his writings and by entering the public forum to influence public opinion. The plaintiff has voluntarily acted to influence the resolution of a public controversy,” the court wrote.⁹⁴ Thus, as a public figure, plaintiff would have to prove actual malice or that the newspaper published false factual statements with reckless disregard for their falsity or with knowledge that they were false, which did not happen here.⁹⁵

Additionally, the court found the controversial statements were matters of protected opinion and even held that plaintiff’s arguments were undercut by statements in the newspaper articles themselves, which praised, if not “exonerated,” plaintiff.⁹⁶

III. DEFAMATION – OPINION

The appellate division affirmed a lower court finding that statements calling two accusers in a high-profile college basketball scandal “liars” were protected opinion in *Davis v. Boenheim*.⁹⁷ This decision was the latest in an ongoing legal saga that is also the subject of a second defamation case.⁹⁸

The court determined the offending statements were pure opinion not susceptible of defamatory meaning by applying the three factors from *Mann v. Abel*.⁹⁹ *Mann* requires courts to consider: 1) whether the language has a precise and readily understood meaning; 2) whether the statements can be proven true or false; and 3) whether in the full context the reader can determine the statement is an opinion.¹⁰⁰

The court acknowledged that even though some of the statements were indeed factual—particularly statements accusing plaintiffs of having a financial motivation—the court also noted that the tone and context of the statements, when viewed by a reasonable reader, would not be actionable.¹⁰¹ Furthermore, the court reiterated avoiding

93. *Id.* at 1, 3.

94. *Id.* at 9.

95. *Id.* at 10-11.

96. *Borzellieri*, No. 11731/12, 2013 N.Y. Slip Op. 50624(U), at 8, 11.

97. 110 A.D.3d 1431, 1431, 1433, 972 N.Y.S.2d 385, 387-88 (4th Dep’t 2013).

98. See Roy S. Gutterman, *Media Law, 2012-13 Survey of New York Law*, 63 SYRACUSE L. REV. 865, 873-74 (2013) (addressing the lower court’s opinion).

99. *Davis*, 110 A.D.3d at 1432, 972 N.Y.S.2d at 387 (citing *Mann v. Abel*, 10 N.Y.3d 271, 276, 88 N.E.2d 884, 886, 856 N.Y.S.2d 31, 33 (2008)).

100. *Mann*, 10 N.Y.3d at 276, 885 N.E.2d at 886.

101. *Davis*, 110 A.D.3d at 1432, 972 N.Y.S.2d at 387-88.

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“hypertechnical parsing” of language to find defamatory meaning.¹⁰²
The court wrote:

We conclude that defendant’s statements demonstrate his support for Fine, his long-time friend and colleague, and also constitute his reaction to plaintiff’s implied allegation, made days after Penn State University fired its long-term football coach, that defendant knew or should have known of Fine’s alleged improprieties. We therefore conclude that the content of the statements, together with the surrounding circumstances “are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.”¹⁰³

Two justices filed a dissent arguing the dismissal was improperly granted because the statements constituted “mixed opinion” with an assertion of a false statement of fact that could be defamatory.¹⁰⁴

A newspaper article about abuses perpetrated against handicapped adults illustrating how a car dealer took advantage of an autistic adult, overcharging him in the purchase of a used car, was not defamatory, the appellate division held in *Hustedt Chevrolet, Inc. v. Newsday, Inc.*¹⁰⁵ The article, published under the headline “Risks of giving autistic adults financial freedom,” was not defamatory as a matter of law.¹⁰⁶ “Even if the newspaper article in question can be interpreted to imply the defamatory meaning alleged in the complaint, . . . it is nevertheless nonactionable as an expression of pure opinion based upon disclosed facts,” the court wrote.¹⁰⁷

IV. DEFAMATION – PRIVILEGE

A newspaper’s coverage of a federal contractor’s corruption case and guilty plea in federal court was considered absolutely privileged and could not be defamatory, the Court of Appeals ruled in *Alf v. Buffalo News, Inc.*¹⁰⁸ Text in both news stories and editorials saying plaintiff, owner of a company, National Air Cargo (“NAC”), admitted his company “cheated” the government and would pay \$28 million in

102. *Id.* at 1432, 972 N.Y.S.2d at 388.

103. *Id.* at 1433, 972 N.Y.S.2d at 388 (quoting *Mann*, 10 N.Y.3d at 276, 885 N.E.2d at 886, 856 N.Y.S.2d at 33).

104. *Id.* at 1435, 972 N.Y.S.2d at 389-90 (Smith & Fahey, JJ., dissenting) (citations omitted).

105. 99 A.D.3d 762, 763, 951 N.Y.S.2d 681, 681-82 (2d Dep’t 2012).

106. *Id.* at 763, 951 N.Y.S.2d at 681-82.

107. *Id.* at 763, 951 N.Y.S.2d at 682.

108. 21 N.Y.3d 988, 989, 995 N.E.2d 168, 169, 972 N.Y.S.2d 206, 207 (2013).

finer, was not defamatory.¹⁰⁹ Plaintiff unsuccessfully argued at the high court as well as at the lower courts that the published accounts were false and misleading, imputing ongoing criminal activity, instead of a single admitted statement.¹¹⁰

The average reader, however, would not read the statements and conclude that plaintiff personally engaged in wrongdoing, the Court held.¹¹¹ More importantly, because the newspaper relied on information gleaned from court papers and proceedings, the statements were absolutely privileged under Civil Rights Law section 74.¹¹² The so-called “fair and true report” privilege is afforded “liberality” in interpretation, the court held.¹¹³ “Here, [Buffalo] News provided substantially accurate reporting of the plea agreement and the fines and restitution, as discussed in open court. Thus, all the challenged statements concerning NAC and plaintiff relating to these proceedings are entitled to immunity under Civil Rights Law [section] 74,” the Court wrote.¹¹⁴

The Syracuse basketball scandal litigation also hit federal court with a libel suit against ESPN by Laurie Fine, wife of the former assistant coach Bernie Fine.¹¹⁵ Here, the court dismissed some of the defamation claims against the sports network as privileged as fair and accurate reports of official proceedings.¹¹⁶

V. DEFAMATION – ONLINE IMMUNITY AND THE COMMUNICATIONS DECENCY ACT, SECTION 230

A dentist’s libel suit against the consumer ratings and gripe website, Yelp, was dismissed because the website had immunity under section 230 of the Communications Decency Act.¹¹⁷ In this case, the dentist objected to two negative reviews of his services and argued that the website acted as a publisher because of its filtering technology, which removed positive reviews and highlighted negative reviews.¹¹⁸ The court applied the three criteria for immunity under section 230: (1) defendant must be a provider of an interactive computer service;

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* (quoting N.Y. CIV. RIGHTS LAW § 74 (McKinney 2009)).

113. *Alf*, 21 N.Y.3d at 990, 995 N.E.2d at 169, 972 N.Y.S.2d at 207.

114. *Id.*

115. *Fine v. ESPN, Inc.*, 2013 U.S. Dist. LEXIS 17729, at *1-2 (N.D.N.Y. 2013).

116. *Id.* at *8, *12 (citing N.Y. CIV. RIGHTS LAW § 74).

117. *Braverman v. Yelp, Inc.*, No. 155629/12, 2013 N.Y. Slip Op. 31407(U), at 2-3 (Sup. Ct. N.Y. Cnty. 2013).

118. *Id.* at 3.

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(2) plaintiff seeks to hold defendant liable as a “publisher or speaker”; and (3) the case emanates from content provided by another content provider.¹¹⁹ Even Yelp’s filtering technology and advertising services did not convert the website into a publisher, the court held.¹²⁰

A state trial court dismissed a Georgia-based website operator from a defamation suit by a “celebrity accountant” who had been accused of marital infidelity and other misdeeds on a website by a third party.¹²¹ Without any provable or substantial ties to New York, the defendant made a convincing argument for dismissal under CPLR section 3211.¹²² The court found further support in New York’s bar on defamation claims based on out-of-state websites under CPLR section 302(a)(1), as well as the federal Communications Decency Act section 230.¹²³

VI. DEFAMATION – MISCELLANEOUS

A. Jurisdiction

Potentially defamatory and negative comments about a New York state resident on an out-of-state gripe website could not be seated in New York state, a federal district court judge and magistrate ruled in *Seldon v. Magedson*.¹²⁴ The district court judge accepted the Report and Recommendations of a federal magistrate in dismissing the case.¹²⁵ The website, www.ripoffreport.com, owned by a limited liability company in Arizona, allowed users to post reports about businesses and business practices.¹²⁶ Several users posted statements about plaintiff, accusing him of sexual harassment, fraud, and tax evasion.¹²⁷

In dismissing the claim for lack of subject matter jurisdiction, the court applied CPLR section 301 and New York’s long-arm statute, CPLR section 302.¹²⁸ None of the criteria for seating a case in the jurisdiction applied to the website, the court said.¹²⁹ Given the nature of

119. *Id.* at 4 (citing *Shiamili v. Real Estate Group of N.Y., Inc.*, 17 N.Y.3d 281, 286, 952 N.E.2d 1011, 1015, 929 N.Y.S.2d 19, 23 (2011)).

120. *Id.* at 6.

121. *Foster v. Matlock*, No. 110365/11, 2012 N.Y. Slip Op. 31363(U), at 2-3 (Sup. Ct. N.Y. Cnty. 2012).

122. *Id.* at 4-5.

123. *Id.* at 6-8.

124. 2012 U.S. Dist. LEXIS 141209, at *2 (S.D.N.Y. 2012).

125. *Id.* at *1-2; *see also Seldon v. Magedson*, 2012 U.S. Dist. LEXIS 141616, at *54 (S.D.N.Y. 2012).

126. *Seldon*, 2012 U.S. Dist. LEXIS 141209, at *3.

127. *Id.*; *see also Seldon*, 2012 U.S. Dist. LEXIS 141616, at *4.

128. *Seldon*, 2012 U.S. Dist. LEXIS 141209, at *4.

129. *Id.* at *4-5 (Section 301 allows an out-of-state corporation to be subject to New York jurisdiction if the company: (1) has an office in New York; (2) solicits business in the

websites, state and federal courts are loath to attach jurisdiction in the state in cases without thoroughly satisfying the CPLR elements.¹³⁰ “General jurisdiction does not attach where, as here, the website merely allows the viewer to contact the operator and exchange information but does not allow users to ‘conduct any actual commerce,’” the court wrote.¹³¹

The court also reinforced CPLR section 302(a)(2), an important provision that “explicitly excludes” defamation claims by out-of-state entities without ties to New York.¹³² To seat a defamation claim in the state, the parties must transact significant business in New York, and the potentially defamatory statement must be “intended to target or focus on internet users in the state where the cause of action is filed.”¹³³ The district court, quoting the magistrate, wrote:

“[T]he defamation claims arise solely from the posting of reports by members of the public on a mostly interactive website that does not itself engage in commercial activity, much less commercial activity targeting New York.” As such, Plaintiff has failed to sustain his burden of demonstrating that his claims arose from business transacted by Defendants in New York pursuant to Section 302(a)(1).¹³⁴

B. Statute of Limitations

A doctor’s efforts to repair her name after critical comments were posted about her on a website forum about doctors were too late under New York’s one-year statute of limitation for defamation, a state trial court ruled.¹³⁵ Like many cases involving online speech, this case required the plaintiff to file additional procedural papers to unmask the anonymous writers of the online criticism.¹³⁶ The anonymous statements posted on a website, called “vitals.com,” called plaintiff “a terrible doctor” who is “mentally unstable and has poor skills. Stay far

state; (3) has a bank account or property in the state; (4) has a phone listing in the state; or (5) has individuals permanently located in the state to promote or operate its interests.).

130. *Id.* at *6.

131. *Id.* (citing *Yanouskiy v. Eldorado Logistics Sys., Inc.*, 2006 U.S. Dist. LEXIS 76604, at *6 (E.D.N.Y. 2006)).

132. *Id.* at *9 (citing *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 244-45 (2d Cir. 2007)).

133. *Seldon*, 2012 U.S. Dist. LEXIS 141209, at *10 (quoting *Knight-McConnell v. Cummins*, 2005 U.S. Dist. LEXIS 11577, at *9 (S.D.N.Y. 2005)).

134. *Id.* at *12 (quoting *Seldon v. Magedson*, 2012 U.S. Dist. LEXIS 141616, at *43 (S.D.N.Y. 2012)).

135. *Tener v. Cremer*, No. 104583/10, 2012 N.Y. Slip Op. 32022(U), at 8 (Sup. Ct. N.Y. Cnty. 2012); *see also* N.Y. C.P.L.R. § 215(3) (McKinney 2013).

136. *Tener*, No. 104583/10, 2012 N.Y. Slip Op. 32022(U), at 3.

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away!”¹³⁷

Plaintiff filed a summons with notice naming a plaintiff and a number of “Doe” defendants two days prior to the expiration of the statute of limitations.¹³⁸ Plaintiff then sought to invoke CPLR section 1024, which allows a party to seek out additional defendants, and CPLR section 306-b, which affords a plaintiff an additional 120 days to locate and serve a proper defendant.¹³⁹

The court found plaintiff did not perform “diligent” or adequate work to locate a proper defendant and should not have been afforded any procedural extension to toll the statute of limitations.¹⁴⁰ Furthermore, plaintiff’s efforts to unmask the anonymous poster were served after the statute of limitations expired.¹⁴¹

Substantively, the court felt dismissal was warranted because the posted statements were matters of protected opinion.¹⁴²

The court wrote:

Here, the statement was posted, anonymously, on an internet message board—a format and forum commonly used by unidentified writers to make unsupported and often baseless assertions of opinions. Such website specifically calls for opinions as to medical doctors. The anonymous statement contains no accompanying factual description and no details describing any particular interaction that the poster may have had with Dr. Tener.¹⁴³

C. Procedural

Dismissal of a libel claim was upheld by the appellate division because plaintiff failed to set forth specifically how he was defamed in two newspaper stories about plaintiff’s real estate transactions, the appellate division ruled in *Abakporo v. Daily News*.¹⁴⁴ “[A] reading of the annexed articles does not reveal the allegedly defamatory material,” the court wrote, affirming the lower court’s dismissal of the case.¹⁴⁵

Plaintiff had also pleaded that a photograph of him published in the newspaper should be considered unlawful misappropriation of his

137. *Id.* at 2.

138. *Id.* at 3. In the amended filing, the initial defendant was dropped and the current defendant was substituted in her place. *Id.*

139. *Id.* at 3-4.

140. *Tener*, No. 104583/10, 2012 N.Y. Slip Op. 32022(U), at 5-6.

141. *Id.* at 8.

142. *Id.* at 8-9.

143. *Id.* at 9.

144. 102 A.D.3d 815, 817, 958 N.Y.S.2d 445, 447 (2d Dep’t 2013).

145. *Id.* at 816, 958 N.Y.S.2d at 447.

likeness or image under the New York Civil Rights Law section 50.¹⁴⁶ News, however, is not a commercial use, the court wrote, reiterating long-standing common law under the statute.¹⁴⁷ “The complaint does not adequately allege facts that would establish that the subject photograph, which accompanied a newspaper article, was used for advertising or trade purposes,” the court wrote.¹⁴⁸

D. Trade Libel

A defamation and trade libel suit by a publicly traded company in the silver production business was dismissed because analysis of the company’s earnings and accounting practices was deemed protected opinion, a state supreme court ruled.¹⁴⁹ The court dismissed the far-reaching complaint for failure to state a claim.¹⁵⁰

VII. INVASION OF PRIVACY

A college professor’s defamation and invasion of privacy claims against a newspaper were properly dismissed, the appellate division ruled in *Fleischer v. NYP Holdings, Inc.*, because statements linking plaintiff to complaints about a neighborhood restaurant were protected opinion.¹⁵¹ The articles were also published online on the *New York Post*’s website and then picked up by web-based aggregators, including Gawker.¹⁵² Plaintiff was referenced in two newspaper articles about the closure of a New York City restaurant, which she complained had noise and smoke problems.¹⁵³ These references were statements of pure opinion and thus not actionable on their face.¹⁵⁴

A second issue, whether use of plaintiff’s photograph accompanying the news story, constituted an invasion of privacy.¹⁵⁵ The photo, however, was not used for commercial purposes and failed to meet the standards of New York Civil Rights Law sections 50 and 51: “The information at issue—the closing of a popular New York City restaurant and the complaints against it lodged by plaintiff, a local

146. *Id.* at 816, 958 N.Y.S.2d at 446.

147. *Id.* at 817, 958 N.Y.S.2d at 447.

148. *Id.*

149. *Silvercorp Metals Inc., v. Anthion Mgmt. LLC*, No. 150374/2011, 2012 N.Y. Slip Op. 51569(U), at 11-13 (Sup. Ct. N.Y. Cnty. 2012).

150. *Id.* at 14.

151. 104 A.D.3d 536, 537-38, 961 N.Y.S.2d 393, 394-95 (1st Dep’t 2013).

152. *Id.* at 537, 961 N.Y.S.2d at 394.

153. *Id.*

154. *Id.* at 538, 961 N.Y.S.2d at 395.

155. *Id.*

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resident and college professor—was newsworthy, and plaintiff’s photograph bore a real relationship to the story.”¹⁵⁶

In *Lohan v. Perez*, actress Lindsay Lohan brought an invasion of privacy suit against the hip hop singer known as Pitbull for his use of her name in a song.¹⁵⁷ Her claim under Civil Rights Law sections 50 and 51 was initially filed in state court but removed to federal.¹⁵⁸ The song, “Give Me Everything,” released in 2011, included the lyric: “‘So, I’m tiptoein’, to keep flowin’/ I get it locked up like Lindsay Lohan.”¹⁵⁹ Lohan argued that she did not authorize the use of her name and that it was used for commercial purposes.¹⁶⁰

Before ruling on the Federal Rules of Civil Procedure 12(b)(6) motion, the court thoroughly discussed the elements of the tort and its First Amendment implications.¹⁶¹ Under New York law, invasion of privacy can only consist of non-consensual commercial appropriation, which requires a plaintiff to prove: (1) the use of plaintiff’s name, image, or voice; (2) for advertising purposes; (3) without consent; and (4) within New York.¹⁶² The court then analyzed the constitutional implications here, finding the expression, a song, is artistic expression worthy of First Amendment protections.¹⁶³ The song, recognized as art, would not be subject to the statute.¹⁶⁴ “[T]he use of an individual’s name—even without his consent—is not prohibited by the New York Civil Rights Law if that use is part of a work of art,” the court wrote.¹⁶⁵

The court further found that the song was not a commercial or trade use under the statute.¹⁶⁶ Even though the artist generates revenues or profit from his artistic creation, the work is not inherently commercial.¹⁶⁷ The single and isolated use of plaintiff’s name in the song also undercut her case, the court ruled.¹⁶⁸ In addition to dismissing the privacy claim, the court also dismissed additional claims for unjust enrichment and emotional distress.¹⁶⁹

156. *Fleischer*, 104 A.D.3d at 538, 961 N.Y.S.2d at 395.

157. 924 F. Supp. 2d 447, 450 (E.D.N.Y. 2013).

158. *Id.* at 451 n.2.

159. *Id.* at 450-51.

160. *Id.* at 451.

161. *Id.* at 453-54.

162. *Lohan*, 924 F. Supp. 2d at 454 (citing *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 348 (S.D.N.Y. 2002)).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 455-56.

167. *Lohan*, 924 F. Supp. 2d at 455.

168. *Id.*

169. *Id.* at 456.

A model's invasion of privacy claims against a bank that used his photograph in international marketing campaigns was dismissed because he filed his claim outside the one-year statute of limitations.¹⁷⁰ Here, plaintiff had an agreement with an advertising agency but argued that his photograph was used without his consent, violating sections 50 and 51 of the New York Civil Rights Law, the common law right of publicity, as well as invasion of privacy laws in several other states.¹⁷¹

First used in 2003, the court ruled plaintiff did not file his claim within the statute of limitations and the single publication rule applied.¹⁷² The court ruled:

[U]nder New York's "single publication" rule, right of publicity claims accrue from the date of a first publication of an offending time, and the dissemination of that same offending item at a later date does not give rise to a new cause of action, nor toll the statute of limitations.¹⁷³

The court also reiterated that New York does not recognize a common law right of publicity cause of action.¹⁷⁴

A. FOIL/Privacy

A website that posts photographs and other information about arrests, and then seeks fees from those who were arrested for removal, lost its bid to collect large amounts of data from the New York City Department of Corrections.¹⁷⁵ Petitioner, who runs a website, "Busted!," sought addresses, birthdates, photographs, and bond information about people arrested and booked by the New York City Department of Corrections under the Freedom of Information Law ("FOIL").¹⁷⁶ The agency denied the request, and the court affirmed.¹⁷⁷

The court wrote:

Respondents have provided particularized reasons justifying their decision to deny petitioner access to inmate photographs. Relying on FOIL, petitioner is attempting to collect information from respondents in order to exploit inmates for his economic gain, with little concern

170. Kim v. Park, No. 650770/12, 2013 N.Y. Slip Op. 31360(U), at 5 (Sup. Ct. N.Y. Cnty. 2013).

171. *Id.* at 3.

172. *Id.* at 3-4.

173. *Id.* at 4.

174. *Id.* at 5.

175. Prall v. N.Y.C. Dep't of Corrs., 40 Misc. 3d 940, 942, 948, 971 N.Y.S.2d 821, 822-23, 828 (Sup. Ct. Queens Cnty. 2013).

176. *Id.* at 942-43, 971 N.Y.S.2d at 822-23.

177. *Id.* at 942-43, 948, 971 N.Y.S.2d at 823, 828.

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for their economic and personal hardships. Petitioner seeks the personal information of inmates to solicit business for his website “Busted!” It is apparent to this court that respondents have followed proper procedures and the decision to deny access to photographs of inmates was not arbitrary and capricious nor an abuse of discretion.¹⁷⁸

VIII. INTELLECTUAL PROPERTY

*A. Copyright**1. Online Video*

Internet transmission of broadcast television content spawned two Second Circuit opinions and will ultimately rest with the U.S. Supreme Court.

A group of television broadcasters could not prove that an online service that allows subscribers to view television programs violated copyright retransmission rights in *WNET, Thirteen v. Aereo, Inc.*, the Second Circuit affirmed.¹⁷⁹ The court affirmed a fact-heavy district court opinion denying a preliminary injunction by the broadcasters.¹⁸⁰ The U.S. Supreme Court also granted certiorari and heard arguments in April 2014.¹⁸¹

The Second Circuit handled both procedural matters in analyzing plaintiffs’ preliminary injunction as well as the technical aspects of Aereo’s operation,¹⁸² while balancing the elements of the Copyright Act’s public performance and retransmission standards.¹⁸³

Procedurally, the court analyzed the four elements necessary for a plaintiff to successfully win a preliminary injunction: 1) likelihood of success; 2) proof of irreparable harm; 3) balance plaintiff’s hardships; and 4) the public interest.¹⁸⁴ Agreeing with the lower court, the Second Circuit relied heavily on *Cartoon Network LP v. CSC Holdings*, also called the “*Cabelvision*” case, which in 2008 refused to extend copyright protections to a digital video recorder (“DVR”) system.¹⁸⁵

The facts of the case present the latest chapter in developing technology that challenges copyright rights. Here, Aereo operates a service that collects broadcast television content from an extensive

178. *Id.* at 946, 971 N.Y.S.2d at 825.

179. 712 F.3d 676 (2d Cir. 2013).

180. *See* 874 F. Supp. 2d 373 (S.D.N.Y. 2012).

181. *See* *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 896 (2014).

182. *Id.* at 680.

183. *Id.* at 684-96.

184. *Id.* at 684.

185. 536 F.3d 121 (2d Cir. 2008).

series of antenae and retransmits them to subscribers via the Internet.¹⁸⁶ The court equated this technology with that of a DVR.¹⁸⁷

The substantive copyright issues involved the Copyright Act's public performance definitions, which grant exclusive rights to copyright holders for public performance, regardless of the technological devices.¹⁸⁸

Equating Aereo's technology to that employed in *Cablevision*, the court considered it akin to a DVR rather than a cable television provider, which would not subject it to the retransmission standards of the copyright law.¹⁸⁹

The court concluded that "Aereo's transmissions of unique copies of broadcast television programs created at its users' requests and transmitted while the programs are still airing on broadcast television are not "public performances" of the Plaintiffs' copyrighted work under *Cablevision*."¹⁹⁰

In *WPIX v. ivi, Inc.*, the Second Circuit also ruled in a case involving an internet company's online live streaming video of copyrighted programs broadcast on television was deemed a harmful infringement and not subject to a compulsory copyright under the Copyright Act.¹⁹¹ The Second Circuit affirmed the lower court's preliminary injunction against defendant.¹⁹²

This case grew out of defendant's use of more than 4000 television programs, which it redistributed on its subscription internet service without consent, licensing from plaintiff television stations and without compensating them either.¹⁹³ Defendant also charged Internet subscribers fees for accessing the material.¹⁹⁴

The novel question addressed here involved whether a web-based Internet site that disseminates copyrighted broadcast content could be equated with cable television distribution, which would afford it the right to obtain a compulsory license under the copyright act.¹⁹⁵ The Copyright Act has been amended to allow cable television operators to

186. *Id.* at 680-81.

187. *Id.*

188. *Id.* at 684-84 (analyzing 17 U.S.C. §§ 101, 106(4)).

189. *Id.* at 690.

190. *Id.* at 696.

191. 691 F.3d 275 (2d Cir. 2012).

192. *Id.* at 277; *see also* 765 F. Supp. 2d 594 (S.D.N.Y. 2011).

193. *WPIX*, 691 F.3d at 277. Defendant had unsuccessfully sought a declaratory action in district court in Washington. *See* 2011 U.S. Dist. LEXIS 4925 (W.D. Wash. 2011).

194. *WPIX*, 691 F.3d at 277.

195. *Id.* at 278.

retransmit broadcasts over cable wires or satellite networks, as long as they pay royalties.¹⁹⁶ The question of the modern application of cable television standards of copyright law in the Internet age required the court to not only review the statute and legislative history, but also defer to opinions by the U.S. Copyright Office.¹⁹⁷ This approach led the court to review the standards and opinions of the administrative agency through the standards established through what has become known as the “*Chevron Test*,” which defers to the expertise of an administrative agency.¹⁹⁸

The opinion delved into the history of cable television (a means to provide rural and geographically impeded parts of the country with television service as far back as the 1940s)¹⁹⁹ and the global electronic nature of the computer-based Internet.²⁰⁰

With regard to the legislative history, the court ruled:

Congress did not, however, intend for § 111’s compulsory license to extend to Internet transmissions. Indeed, the legislative history indicates that if Congress had intended to extend § 111’s compulsory license to Internet retransmissions, it would have done so expressly – either through the language of § 111 as it did for microwave retransmission or by codifying a separate statutory provision as it did for satellite carriers.²⁰¹

The court also deferred to the Copyright Office, which similarly followed both caselaw and the legislative history.²⁰² Further, the court issued a four-point concluding analysis: (1) the statutory language was “unambiguous” regarding retransmission of programming on cable television and the Internet; (2) the legislative history showed that Congress did not intend to extend these standards to the internet; (3) the Copyright Office’s interpretation mirrors the Congressional intent; and (4) the district court ruled accordingly.²⁰³

Further, the court upheld the district court’s injunction, agreeing that the webstreaming could create an irreparable injury or irreparable harm because the broadcasters would lose advertising revenue and fail

196. *Id.* (discussing U.S. Copyright Act, 17 U.S.C. § 111).

197. *Id.* at 279.

198. *Id.* at 279-84 (applying *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 476 U.S. 837 (1984)).

199. *WPJX*, 691 F.3d at 281.

200. *Id.* at 280 (quoting *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997)).

201. *Id.* at 282.

202. *Id.* at 284.

203. *Id.* at 284-85.

to recoup other fees from the unlicensed retransmissions.²⁰⁴

The public interest aspect of the court's decision concluded:

Plaintiffs are copyright owners of some of the world's most recognized and valuable television programming. Plaintiffs' television programming provides a valuable service to the public, including, inter alia, educational, historic, and cultural programming, entertainment, an important source of local news critical for an informed electorate, and exposure to the arts. Plaintiffs desire to create original television programming surely would be dampened if their creative works could be copied and streamed over the Internet in derogation of their exclusive property rights.²⁰⁵

2. Photographs

The Second Circuit determined that some photographs appropriated by an artist could be considered an infringement on a copyright while others were manipulated enough to constitute a "transformative use" in *Cariou v. Prince*.²⁰⁶ This case involved an "appropriation artist's" use of 30 photographs taken by photographer Patrick Cariou and published in Cariou's book, *Yes Rasta*, based on his six years living and photographing Rastafarians and the landscapes in Jamaica.²⁰⁷ The artist, Richard Prince, used Cariou's pictures and superimposed additional images and created collages of Cariou's works.²⁰⁸ The works were displayed in galleries in New York and elsewhere and some were sold to art collectors.²⁰⁹

The court wrestled with the artwork, particularly whether an artist like Prince, in the vein of iconic artist Andy Warhol, can basically appropriate—or take and use—copyrighted material and transform it into something new.²¹⁰ This concept of "transformative use" as a defense to a copyright infringement claim, is a relatively new adaptation of the statutory fair use defense.²¹¹

This decision applied the four factors of the fair use defense—(1) purpose and character of use; (2) nature of the copyrighted work; (3) amount and substantiality of the use; and (4) the effect on the

204. *WPIX*, 691 F.3d at 285-86.

205. *Id.* at 288.

206. 714 F.3d 694 (2d Cir. 2013).

207. *Id.* at 698-99.

208. *Id.*

209. *Id.* In addition to the underlying copyright dispute, plaintiff sought to hold the gallery as a secondary infringer.

210. *Id.* at 706.

211. *Cariou*, 714 F.3d at 706.

market—with an edge toward the artistic renderings at issue.²¹²

Transformative use requires the secondary user to essentially use the underlying copyrighted works as “raw material” for a new “transformed” work with new value.²¹³ The court found that twenty-five of Prince’s works did just this, creating “an entirely different aesthetic from Cariou’s photographs.”²¹⁴ Adding a commentary to underlying work is part of the process, too, the court wrote.²¹⁵

The court analyzed:

It is not surprising that, when transformative use is at issue, the alleged infringer would go to great lengths to explain and defend his use as transformative. . . . What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work.²¹⁶

In concluding that twenty-five of the thirty photographs used by Prince were his own new creations, the court remanded the case of the five outstanding photographs for the district court.²¹⁷ These, the court wrote, were “a closer call.”²¹⁸

A news agency’s use of photos posted on Twitter created a matter for jury consideration in *Agence France Presse v. Morel*.²¹⁹ This case, the subject of three reported opinions, addressed whether the extent to which a photographer retains copyright ownership after posting photos of the 2010 Haitian earthquake.²²⁰ Agence France Presse (“AFP”), one of the world’s largest news organizations, took Morel’s photographs and distributed them through its news service.²²¹ Among the issues addressed by the court were secondary and wilful²²² uses and the safe harbor provisions of the Digital Millennium Copyright Act.²²³

The court also notably discussed the terms of service agreement for

212. *Id.* at 705 (citing 17 U.S.C. § 107) (applying *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006)).

213. *Id.* (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990)).

214. *Id.* at 706.

215. *Id.*

216. *Cariou*, 714 F.3d at 707.

217. *Id.* at 711.

218. *Id.*

219. 934 F. Supp. 2d 584 (S.D.N.Y. 2013); *see also* 934 F. Supp. 2d 547 (S.D.N.Y. 2013).

220. 934 F. Supp. 2d at 550.

221. *Id.* The case also involved secondary users of the photos including Getty Images and The Washington Post.

222. *Id.* at 569-70.

223. *Id.* at 564-68

Twitter users and AFP's argument that it had a right to use the photos as beneficiaries of the agreement between Twitter and users such as Morel.²²⁴

The court also determined that Morel should be able to recover damages under the Copyright Act,²²⁵ a matter that was later determined by a jury trial.²²⁶

3. News Content

A district court accepted the Associated Press's motion for summary judgment in a copyright suit against an online news service that appropriated news articles and distributed them to subscribers in *Associated Press v. Meltwater*.²²⁷ Meltwater's computer programs would "scrape" the internet collecting articles and information that were passed on to its subscribers for a fee, which defendant argued should be considered a fair use under the statute.²²⁸ Based in Norway, Meltwater's "software ad a service" programs had global reach and a global customer base, while the Associated Press ("AP") is the world's largest news organization and news cooperative, generating at least \$75 million from Internet licensing of its news content.²²⁹

The litigation in this case appeared complicated with AP suing for copyright infringement, contributory infringement, vicarious infringement, hot news misappropriation, removal of content, and a declaratory action.²³⁰ Conversely, Meltwater sought its own declaratory judgment and posited a defense based fair use as well as the Digital Millennium Copyright Act.²³¹

The court addressed the four elements of the fair use defense and determined that "AP has shown through undisputed evidence that Meltwater's copying is not protected by the fair use doctrine."²³²

B. Appropriation

An appropriation and breach of contract claim by an "extra" in a

224. *Id.* at 560-61; *see also* 769 F. Supp. 2d 295 (S.D.N.Y. 2011).

225. 934 F. Supp. 2d at 594.

226. *See* Clerk's Judgment, December 10, 2013 (jury award of \$1.2 million in damages).

227. 931 F. Supp. 2d 537 (S.D.N.Y. 2013).

228. *Id.* at 541.

229. *Id.* at 542.

230. *Id.* at 548.

231. *Id.* As discussed above, the four elements of fair use require analysis of (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 on the market. 17 U.S.C. § 107.

232. *Associated Press*, 931 F. Supp. 2d at 551.

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1979 cult film, “The Warriors,” was properly dismissed after he failed to prove that a video game adaptation of the film invaded his privacy and improperly used his image and likeness, a district court ruled in *Harding v. Paramount Pictures*.²³³ The district court adopted the findings and recommendations from a federal magistrate judge.²³⁴ The 2006 video game adaptation generated \$27 million in sales, which plaintiff argued were not part of his initial agreement with the filmmakers in 1979.²³⁵

The court, however, pointed to his contract agreement, a lack of resemblance between plaintiff’s character and the likeness in the game and the tenants of privacy under sections 50 and 51 of the Civil Rights Law.²³⁶

The court wrote:

Plaintiff has not shown that there are any genuine issues of material fact concerning whether his likeness was used in the Warriors Video game . . . there is simply no resemblance between the Video Game Character and Plaintiff as he appeared in the Warriors film. This absence of similarity is fatal to Plaintiff’s privacy claim.²³⁷

233. 2013 U.S. Dist. LEXIS 44954 (S.D.N.Y. 2013).

234. *Harding v. Paramount Pictures*, 2013 U.S. Dist. LEXIS 54217, at *1 (S.D.N.Y. 2013).

235. *Id.* at *3-4.

236. *Id.* at *29-30.

237. *Id.* at *30.