

## MEDIA LAW

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### INTRODUCTION

Developments in Media Law for this year's *Survey* cover a colorful cast of characters from lingerie models to businessmen to the inspiration for the television character from *Seinfeld*, Kramer. Media defendants across platforms—newspapers to online sites—attempted to fend off defamation and invasion of privacy cases from a broad range of litigants who had been accused of, among other things, prostitution, political corruption, criminal activity, and general incompetence.

## I. GENERAL MEDIA LAW ISSUES

The Court of Appeals invalidated an Albany County cyberbullying statute on vagueness, overbreadth, and First Amendment grounds in *People v. Marquan M.*<sup>1</sup> The defendant, who created a Facebook page with offensive commentary and pictures about classmates and their sexual practices and experiences, had been prosecuted and pleaded guilty to violating the 2010 law which criminalized a host of online activities.<sup>2</sup> The misdemeanor, “punishable by up to one year in jail and [up to] a \$1,000 fine,” aimed to protect children and curb the growing trend of so-called cyberbullying aimed at a minor or person.<sup>3</sup>

The Court dissected the following language from Albany County Local Law No. 11 of 2010, section 2:

[A]ny act of communicating or causing a communication to be sent by mechanical or electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information, or sending hate mail, with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person.<sup>4</sup>

Because of the obvious potential effect on free speech and First Amendment implications, the Court determined that the law was both vague and overbroad.<sup>5</sup> As a content restriction, the Court also refused to sever the statute or assume the role of the legislature in salvaging vestiges of the statute under the First Amendment.<sup>6</sup> Without narrow tailoring or a proven compelling government interest under strict scrutiny, the statute violated the First Amendment, the Court ruled.<sup>7</sup> The Court further restrained itself by ignoring the question of whether cyberbullying should or could be criminal.<sup>8</sup>

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1. 24 N.Y.3d 1, 12, 19 N.E.3d 480, 488, 994 N.Y.S.2d 554, 562 (2014).

2. *Id.* at 3, 6-7, 19 N.E.3d at 482, 484, 994 N.Y.S.2d at 556, 558.

3. *Id.* at 5-6, 19 N.E.3d at 483-84, 994 N.Y.S.2d at 557-58 (discussing Albany Cnty. Local Law No. 11 of 2010, § 4 (adopted Nov. 8, 2010)).

4. *Id.* at 6, 19 N.E.3d at 484, 994 N.Y.S.2d at 558 (citing Albany Cnty. Local Law No. 11 of 2010, § 2).

5. *Id.* at 11-12, 19 N.E.3d at 488, 994 N.Y.S.2d at 562.

6. *Marquan M.*, 24 N.Y.3d at 10-11, 19 N.E.3d at 487, 994 N.Y.S.2d at 561.

7. *Id.* at 10-11, 19 N.E.3d at 487-88, 994 N.Y.S.2d at 561-62.

8. *Id.* at 8 n.3, 19 N.E.3d at 485 n.3, 994 N.Y.S.2d at 559 n.3.

The Court characterized the statute as ““a criminal prohibition of alarming breadth””<sup>9</sup> and would have a clear chilling effect on a range of speech.<sup>10</sup>

The Court wrote:

But such methods of expression are not limited to instances of cyberbullying—the law includes every conceivable form of electronic communication, such as telephone conversations, a ham radio transmission or even a telegram. In addition, the provision pertains to electronic communications that are meant to “harass, annoy . . . taunt . . . [or] humiliate” any person or entity, not just those that are intended to “threaten, abuse . . . intimidate, torment . . . or otherwise inflict significant emotional harm on” a child. In considering the facial implications, it appears that the provision would criminalize a broad spectrum of speech outside the popular understanding of cyberbullying, including, for example: an email disclosing private information about a corporation or a telephone conversation meant to annoy an adult.<sup>11</sup>

The Court wrestled with whether the type of speech targeted in the statute may otherwise be punishable, such as the specific categories including fighting words, true threats, incitement, obscenity, child pornography, fraud, or defamation.<sup>12</sup> The Court also noted that speech outside one of these well-defined categories is presumptively protected by the First Amendment.<sup>13</sup>

While praising the Albany County legislature for passing a law with a “laudable public purpose of shielding children from cyberbullying,” the law fell egregiously short of passing First Amendment scrutiny.<sup>14</sup> “Even if the First Amendment allows a cyberbullying statute of the limited nature proposed by Albany County, the local law here was not drafted in that manner. Albany County therefore has not met its burden of proving that the restrictions on speech contained in its cyberbullying law survive strict scrutiny,” the Court wrote.<sup>15</sup>

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9. *Id.* at 9, 19 N.E.3d at 486, 994 N.Y.S.2d at 560 (citing *United States v. Stevens*, 559 U.S. 460, 474 (2010)).

10. *Id.*

11. *Marquan M.*, 24 N.Y.3d at 9, 19 N.E.3d at 486, 994 N.Y.S.2d at 560 (alteration in original) (quoting Albany Cnty. Local Law No. 11 of 2010, § 2 (adopted Nov. 8, 2010)).

12. *Id.* at 7, 19 N.E.3d at 485, 994 N.Y.S.2d at 559.

13. *Id.*

14. *Id.* at 11, 19 N.E.3d at 488, 994 N.Y.S.2d at 562.

15. *Id.* Judge Smith filed a dissent questioning whether the speech at issue should be protected. *Marquan M.*, 24 N.Y.3d at 12-15, 19 N.E.3d at 488-90, 994 N.Y.S.2d 24 at 562-64 (Smith, J., dissenting).

The Court of Appeals also declared a section of the penal code proscribing online impersonations unconstitutional in *People v. Golb*.<sup>16</sup> In this case, a Dead Sea Scrolls scholar went online using pseudonyms to praise his father, another scholar, and to discredit other scholars.<sup>17</sup> He was prosecuted and convicted on thirty counts, including charges for criminal impersonation, forgery, identity theft, aggravated harassment, and unauthorized use of a computer.<sup>18</sup> The Court vacated a number of the convictions, particularly those under Penal Law section 240.30(1)(a), which the Court found unconstitutional under both the State and Federal Constitution.<sup>19</sup>

The Court agreed with the defendant “that the statute is unconstitutionally vague and overbroad, and that his conviction of three counts of aggravated harassment related to his conduct . . . must be vacated.”<sup>20</sup> The Court also vacated the convictions based on identity theft and unauthorized use of a computer.<sup>21</sup> The creation of the bogus emails and accounts did not satisfy the elements of Penal Law section 190.25.<sup>22</sup> The Court wrote, “[u]nlike the other emails, this email sent in another person’s name does not prove the requisite intent to cause injury, either to reputation or otherwise.”<sup>23</sup>

A gag order prohibiting litigants from talking about a civil lawsuit with members of the press or in social media would likely violate the First Amendment, the Eastern District held.<sup>24</sup> A police officer, who was a defendant in a lawsuit against a county government, asked the court to issue both a gag and a protective order to shield information, particularly an internal affairs investigation report linked to the case, from members of the press.<sup>25</sup> The defendant in the underlying suit believed that his case would be harmed and his trial jeopardized by publicity if opposing counsel spoke to the press and documents made their way into press

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16. 23 N.Y.3d 455, 466-68, 15 N.E.3d 805, 813-14, 991 N.Y.S.2d 792, 800-01 (2014).

17. *Id.* at 459, 15 N.E.3d at 808, 991 N.Y.S.2d at 795.

18. *Id.* at 459-60, 15 N.E.3d at 808, 991 N.Y.S.2d at 795.

19. *Id.* at 466-68, 15 N.E.3d at 813-14, 991 N.Y.S.2d at 800-01 (citing N.Y. PENAL LAW § 240.30(1)(a) (McKinney 2012)) (“A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she . . . communicates with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm.”).

20. *Golb*, 23 N.Y.3d at 467, 15 N.E.3d at 813, 991 N.Y.S.2d at 800.

21. *Id.* at 468, 15 N.E.3d at 814, 991 N.Y.S.2d at 801.

22. *Id.* at 466, 15 N.E.3d at 813, 991 N.Y.S.2d at 800.

23. *Id.*

24. *Coggins v. Cnty. of Nassau*, No. 07-CV-3624 (JFB) (AKT), 2014 U.S. Dist. LEXIS 15001, at \*2-4 (E.D.N.Y. Feb. 6, 2014).

25. *Id.* at \*1-2.

accounts.<sup>26</sup>

In denying the request, the court relied on the leading fair trial-free press precedent decided by the Supreme Court, *Sheppard v. Maxwell*.<sup>27</sup> The court, citing *Sheppard*, recommended several alternatives that would preserve the defendant's fair trial while also protecting newsgatherers' concerns in the face of pre-trial publicity.<sup>28</sup> For example, the court recommended possibly seeking a change of venue, postponement, effective use of voir dire, "emphatic jury instructions [or] warnings to the press [or] parties."<sup>29</sup>

"Based on the [c]ourt's experience, it believes that, at least given the press coverage to date and the stage of the proceedings, this process alone will root out any bias," the court held.<sup>30</sup> The defendant's invocation of privacy law as grounds for his request similarly fell short.<sup>31</sup>

## II. DEFAMATION—ELEMENTS

The tort of defamation can be divided into libel per se, libel per quod, and slander.

A former Catholic priest's defamation claims against publishers of a press release announcing his efforts to seek reinstatement was not actionable, the Second Circuit affirmed in *Kavanagh v. Zwilling*.<sup>32</sup>

The plaintiff sued for libel, libel by implication, libel per se and libel per quod, arguing statements in the press release about his earlier defrocking after a secret church tribunal found he had engaged in inappropriate sexual behavior.<sup>33</sup> The press release was published in *Catholic New York* and referred to the underlying church finding, as well as subsequent changes in testimony by an accuser.<sup>34</sup> Primarily, the plaintiff argued that the sentence—"It should be noted that Mr. Kavanagh was found guilty by a Church court of multiple counts of sexual abuse of a minor . . ."—created a false and defamatory impression that he had been convicted in criminal court.<sup>35</sup> The fact-sensitive lower court decision assessed the standards of libel and considered the weight that

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26. *Id.* at \*2.

27. *Id.* at \*3-4 (discussing *Sheppard v. Maxwell*, 384 U.S. 333 (1966)).

28. *Id.* at \*3.

29. *Coggins*, No. 07-CV-3624 (JFB) (AKT), 2014 U.S. Dist. LEXIS 15001, at \*3.

30. *Id.* at \*4.

31. *Id.* at \*11.

32. 578 F. App'x 24, 24-25 (2d Cir. 2014). The appellate ruling was published after the closing date for this *Survey*, but the lower court opinion fell within the *Survey* year. See *Kavanagh v. Zwilling*, 997 F. Supp. 2d 241 (S.D.N.Y. 2014).

33. *Kavanagh*, 997 F. Supp. 2d at 244, 247.

34. *Id.*

35. *Id.*

should be afforded to the findings of the religious body.<sup>36</sup>

The trial court in *Kavanagh* laid out the elements of defamation: (1) a written statement of fact about (of and concerning) the plaintiff; (2) published to a third party; (3) with fault (negligence for private figures or actual malice for public figures or public officials); (4) falsity; and (5) special damages or per se actionability if the statement falls into one of the four per se categories.<sup>37</sup> While libel per se is well-defined throughout this *Survey*, libel per quod requires further discussion because this form of the tort requires “apparent truth in light of extrinsic facts to the audience.”<sup>38</sup> Further proof of special damages is required to satisfy a libel per quod claim.<sup>39</sup>

The Second Circuit affirmed the dismissal, applying three key points: (1) that the plaintiff had been disciplined by a church court, requiring no further judicial authorities as proof; (2) the context of statements in the press release, pertaining to “counts” or charges against the plaintiff was clearly and plainly stated; and (3) that the press release failed to make a “native inference.”<sup>40</sup>

Libel by implication, on the other hand, has not been actively discussed by appellate courts for the past twenty years, an appellate court, stated in *Stepanov v. Dow Jones & Co.*<sup>41</sup> Here, the court reiterated new standards for the libel by implication standard when it affirmed dismissal of a defamation claim by a Russian businessman against a weekly business newspaper.<sup>42</sup> The plaintiff was not expressly named in the article, “Crime and Punishment in Putin’s Russia,” which detailed a range of political corruption involving several businesses and Russian government officials, including the plaintiff’s wife.<sup>43</sup>

With no specific or express defamatory statement about the plaintiff, his lawsuit was vested in the libel by implication theory which would require a jury to “decide whether a libelous intendment would naturally

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36. *Id.* at 255-56.

37. *Id.* at 248 (citing *Celle v. Filipino Reporter Enters., Inc.*, 209 F.3d 163, 176 (2d Cir. 2000)).

38. *Kavanagh*, 997 F.Supp. 2d at 248.

39. *Id.* at 249 (“In the case of libel per quod and libel by implication, however, the truth of the statement standing alone is not necessarily a sufficient defense, as libel by implication ‘is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements.’” (quoting *Armstrong v. Simon & Schuster*, 85 N.Y.2d 373, 380-81, 649 N.E.2d 825, 829, 625 N.Y.S.2d 477, 481 (1995))).

40. *Kavanagh v. Zwilling*, 578 F. App’x 24, 25 (2d Cir. 2014) (applying *Stepanov v. Dow Jones & Co.*, 120 A.D.3d 28, 987 N.Y.S.2d 37 (1st Dep’t 2014)).

41. 120 A.D.3d 28, 30, 987 N.Y.S.2d 37, 39 (1st Dep’t 2014).

42. *Id.* at 31, 37-38, 987 N.Y.S.2d at 39, 44.

43. *Id.* at 31-32, 987 N.Y.S.2d at 39-40.

be given to it by the reading public acquainted with the parties and the subject-matter.”<sup>44</sup> The Court of Appeals ruled on an implication case in 1977, ruling that an author’s omission of minor details in an otherwise accurate news story would not be actionable, and that a certain deference should be paid to the editorial process.<sup>45</sup> A 1995 Court of Appeals decision rejected a defamation by implication claim because the purportedly false statements were verifiable facts, not implied defamation.<sup>46</sup>

To prove libel by implication, the Court requires an objective test to determine “whether the plain language of the communication itself suggests that an inference was intended or endorsed.”<sup>47</sup>

The Court wrote:

To survive a motion to dismiss a claim for defamation by implication where the factual statements at issue are substantially true, the plaintiff must make a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference, and to affirmatively suggest that the author intended or endorsed that inference.<sup>48</sup>

The plaintiff’s case in *Stepanov* failed to establish that he was defamed, even impliedly defamed, throughout the news article and was properly dismissed.<sup>49</sup>

In the same vein, two blog postings that did not clearly identify the plaintiffs could not be held as defamatory about the plaintiffs, the appellate division ruled in *Dong v. Hai*.<sup>50</sup> Here, a failed real estate deal in which the defendant had represented the plaintiff, led to a controversy and the defendant posted critical comments on two blogs.<sup>51</sup> The plaintiffs failed to establish that the blog postings were of and concerning or about them, the court held.<sup>52</sup> “Here, the record reflects that the statements posted on the two blogs not only did not identify plaintiffs by name, but in fact contained details that were substantially different from the details involved in the transaction between [the parties to the real estate deal],”

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44. *Id.* at 35, 987 N.Y.S.2d at 42-43 (quoting *November v. Time, Inc.*, 13 N.Y.2d 175, 179, 194 N.E.2d 126, 129, 244 N.Y.S.2d 309, 312 (1963)).

45. *Id.* at 36, 987 N.Y.S.2d at 43 (citing *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 383, 366 N.E.2d 1299, 1308, 397 N.Y.S.2d 943, 952 (1977)).

46. *Stepanov*, 120 A.D.3d at 36, 987 N.Y.S.2d at 43 (citing *Armstrong v. Simon & Schuster*, 85 N.Y.2d 373, 381, 649 N.E.2d 825, 829-30, 625 N.Y.S.2d 477, 481-82 (1995)).

47. *Id.* at 37, 987 N.Y.S.2d at 44.

48. *Id.* at 37-38, 987 N.Y.S.2d at 44.

49. *Id.* at 40, 987 N.Y.S.2d at 46.

50. 108 A.D.3d 599, 600, 969 N.Y.S.2d 144, 146 (2d Dep’t 2013).

51. *Id.* at 599, 600, 969 N.Y.S.2d at 145.

52. *Id.* at 600, 969 N.Y.S.2d at 146.

the court wrote.<sup>53</sup>

Newspaper allegations that the plaintiff had physically attacked, threatened, and harassed the defendant, could be susceptible of a defamatory meaning, the appellate division ruled in *Martino v. HV News, LLC*.<sup>54</sup> The publication satisfied the basic elements of the tort of defamation, specifically libel and libel per se, the court held.<sup>55</sup> The elements are: 1) a false statement; 2) published without privilege; 3) with fault or negligence.<sup>56</sup> It becomes libel per se if it “tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.”<sup>57</sup> Thus, the court held that the libel complaint should not have been dismissed by the lower court.<sup>58</sup>

State trial courts also handled defamation cases and weighed in on the tort’s basic elements. A book by a writer and guest star of the television show *Seinfeld* prompted a defamation suit by the inspiration for the show’s Cosmo Kramer character, Kenny Kramer, who operated the Kramer Reality Tour.<sup>59</sup> In a chapter mocking the Kramer Reality Tour, itself a spoof and homage to the 1990s *Seinfeld* show, comedian Fred Stoller described a tour guide who made repeated references to the show, including a now famous line, “Not that there’s anything wrong with that!”<sup>60</sup> The line similarly mocks political correctness, and Stoller described how the tour guide repeatedly invoked the line while the tour passed through Greenwich Village, a neighborhood heavily populated by gay people.<sup>61</sup>

The plaintiff argued that the deprecating descriptions in the book, *Maybe We’ll Have You Back: The Life of a Perennial TV Guest Star*, were defamatory, defamatory per se, and committed tortious interference with business relations because it implied that the tour guide, and Kramer himself, were homophobic.<sup>62</sup> The defendant denied the implications and

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53. *Id.*

54. 114 A.D.3d 913, 913-14, 980 N.Y.S.2d 844, 844-45 (2d Dep’t 2014).

55. *Id.* at 914, 980 N.Y.S.2d at 845.

56. *Id.* at 913-14, 980 N.Y.S.2d at 844 (quoting *Epifani v. Johnson*, 65 A.D.3d 224, 233, 882 N.Y.S.2d 234, 242 (2d Dep’t 2009)).

57. *Id.* at 914, 980 N.Y.S.2d at 845 (other citations omitted) (quoting *Matovcik v. Times Beacon Record Newspapers*, 46 A.D.3d 636, 637, 849 N.Y.S.2d 75, 77 (2d Dep’t 2007)).

58. *Id.*

59. *Kramer v. Skyhorse Publ’g, Inc.*, 45 Misc. 3d 315, 316-17, 989 N.Y.S.2d 826, 829 (Sup. Ct. N.Y. Cnty. 2014).

60. *Id.* at 317-18, 989 N.Y.S.2d at 830.

61. *Id.* at 318, 989 N.Y.S.2d at 830.

62. *Id.* at 316-19, 989 N.Y.S.2d at 829-31.



also posited a First Amendment right to mock the tour.<sup>63</sup>

In ruling on the defendant's motion to dismiss under CPLR section 3211(a)(7) for failure to state a cause of action, the court accepted the pleadings, agreeing that the plaintiff at least satisfied the of-and-concerning prong of defamation.<sup>64</sup> With standing established, the court analyzed whether the published statements had a defamatory connotation.<sup>65</sup> The statements could not be defamation per se because they were not specifically about the plaintiff's business, trade, or occupation.<sup>66</sup> The court wrote:

And, as the defamatory content of the statements depends in large part on the *Seinfeld* episode and catch phrase, "Not that there's anything wrong with that," so too must the phrase be reasonably susceptible of a homophobic meaning. On its face, the phrase expressly conveys the notion that there is nothing wrong with being gay. In that respect, it cannot be considered homophobic. That the phrase is not expressly homophobic, however, does not mean that it is not reasonably susceptible of a homophobic meaning. In other words, is there really anything wrong with it?<sup>67</sup>

The context in which the statement was made, the bus tour based on a fictional television show, also requires an understanding of the *Seinfeld* show and the numerous cultural landmarks and catchphrases associated with the show.<sup>68</sup> Thus, the court asked whether an average person could view the book's description of the tour guide as defamatory, which would be defamation by implication, which the court rejected.<sup>69</sup> Further, because of the plaintiff's clear status as a public figure, the court noted that the suit lacked proof of publication with actual malice—knowledge of falsity or reckless disregard for the truth.<sup>70</sup> Thus, the court dismissed the suit in its entirety.<sup>71</sup>

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63. *Id.* at 319, 989 N.Y.S.2d at 831.

64. *Kramer*, 45 Misc. 3d at 316, 321-22, 989 N.Y.S.2d at 829, 832-33 (The court laid out the four basic elements for defamation: 1. a false statement of fact; 2. published to a third party; 3. absent privilege; and 4. causes harm.).

65. *Id.* at 322, 989 N.Y.S.2d at 833-34.

66. *Id.* at 326, 989 N.Y.S.2d at 836.

67. *Id.* at 323, 989 N.Y.S.2d at 834.

68. *Id.* at 323-24, 989 N.Y.S.2d at 834-35.

69. *Kramer*, 45 Misc. 3d at 325, 989 N.Y.S.2d at 835.

70. *Id.* at 325-26, 989 N.Y.S.2d at 836.

71. *Id.* at 326-27, 989 N.Y.S.2d at 836 (citing *White Plains Coat & Apron Co. v. Cintas Corp.*, 8 N.Y.3d 422, 426, 867 N.E.2d 381, 383, 835 N.Y.S.2d 530, 532 (2007)). In its dismissal, the court could have easily added to the so-called "Seinology" by tweaking another famous *Seinfeld* line, which was also referenced in the pleading: "No *suit* for you." Additionally, the court rejected the plaintiff's tortious interference complaint, which failed to establish any of the tort's four elements: 1. existence of a valid contract; 2. defendant's

A New York businessman, whose enterprises include a business that operates a strip club, brought libel per se lawsuits against a newspaper and magazine after they published stories alleging he ran an escort service out of his apartment.<sup>72</sup> The stories emanated from underlying litigation between the plaintiff, Robert Gans, and his condominium board.<sup>73</sup> *The New York Observer* and the *Real Deal*, the defendants in two separately filed cases, based their reporting on a story previously published in *The New York Post*.<sup>74</sup>

The court recapped the legal advantage of libel per se, which does not require the plaintiff to plead special damages if the defamatory statement pertains to one of four categories: charging serious crime; statements that injure someone's reputation in business, trade, or profession; imputing a loathsome disease; or "imputing unchastity to a woman."<sup>75</sup>

The plaintiff argued that the news stories accused him of committing a serious crime, promoting prostitution.<sup>76</sup> The court rejected the plaintiff's claims, holding that the news accounts did not explicitly use the word "prostitution" and noted technical details about the ownership of both the apartment in question and the plaintiff's business, and that the condominium board made allegations against another woman, who was alleged to be the plaintiff's girlfriend.<sup>77</sup> The plaintiff would have to provide additional information or evidence that he was defamed, the court held.<sup>78</sup>

### III. DEFAMATION—PUBLIC/PRIVATE FIGURE/ACTUAL MALICE

Whether a plaintiff is viewed as a public or private figure plays into the standard the court must apply in a defamation case: negligence for private figures and actual malice for public figures.

A series of newspaper columns that contained errors and "sloppy and careless" reporting could not sustain a defamation claim because the plaintiff, a sitting New York State Supreme Court Justice, could not

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knowledge of the contract; 3. defendant's intentional and improper breach of the contract; and 4. damages. *Id.* at 327, 989 N.Y.S.2d at 837.

72. *Gans v. N.Y. Observer*, No. 155254/13, 2014 N.Y. Slip Op. 51054(U), at 1-2 (Sup. Ct. N.Y. Cnty. 2014).

73. *Id.*

74. *Id.*

75. *Id.* at 5 (citing *Lieberman v. Gelstein*, 80 N.Y.2d 429, 434-35, 605 N.E.2d 344, 347, 590 N.Y.S.2d 857, 860 (1992)).

76. *Id.* at 5-6.

77. *Gans*, No. 155254/13, 2014 N.Y. Slip Op. 51054(U), at 6.

78. *Id.* at 7.

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establish actual malice in *Martin v. Daily News L.P.*, the appellate division ruled.<sup>79</sup> The court rejected the defendants' arguments that the allegations of corruption leveled against the judge in the columns should be protected by the opinion privilege,<sup>80</sup> or the fair and true reporting privilege under New York Civil Rights Law section 74.<sup>81</sup>

However, because the plaintiff was a sitting judge, he was treated as a public figure and required to not only prove the prima facie elements of defamation—a false statement of fact that is published and causes harm to his reputation through hatred, public contempt, ridicule, or aversion<sup>82</sup>—but also actual malice.<sup>83</sup> Also known as *The New York Times* rule or privilege, actual malice means a public figure plaintiff must prove that the defamatory statements were published either with known falsity or reckless disregard for the truth.<sup>84</sup> The plaintiff would have to prove that the defendant published the information with “a high degree of awareness of [its] probable falsity.”<sup>85</sup> The “sometimes inaccurate reporting,” also characterized as “simply sloppy and careless,” did not amount to actual malice, the court held.<sup>86</sup>

The court also affirmed dismissal of the claim, reiterating the “single publication rule.”<sup>87</sup> The plaintiff argued that there was a second publication or a republication of the offending columns because the defendant newspaper had transferred them to a new digital format on the internet.<sup>88</sup> Ordinarily, the single publication rule only allows one viable cause of action for publication, even if a newspaper is also available online.<sup>89</sup> This bar can be overcome if subsequent publications, either online or in a different format, are indeed new or different publications

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79. 121 A.D.3d 90, 93, 103, 990 N.Y.S.2d 473, 476, 483 (1st Dep't 2014).

80. *Id.* at 101, 990 N.Y.S.2d at 482. The defamatory content, though appeared within the newspaper's opinion section, could not be viewed as protected pure opinion because the specific allegations imputing judicial corruption affected the plaintiff's fitness for office, or provable illegal activity. *Id.*

81. *Id.* (citing N.Y. CIV. RIGHTS LAW § 74 (McKinney 2014) (providing an absolute privilege under the fair and true report of government proceedings or public records.)). The defendant's erroneous reporting based on some legal documents vitiated the privilege, the court held. *Id.*

82. *Martin*, 121 A.D.3d at 99, 900 N.Y.S.2d at 480 (quoting *Thomas H. v. Paul B.*, 18 N.Y.3d 580, 583, 965 N.E.2d 939, 942, 942 N.Y.S.2d 437, 440 (2012)).

83. *Id.* at 99, 101-02, 900 N.Y.S.2d at 480, 482.

84. *Id.* at 101-02, 900 N.Y.S.2d at 482 (applying *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

85. *Id.* at 102, 900 N.Y.S.2d at 482 (alteration in original) (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991)).

86. *Id.* at 103, 900 N.Y.S.2d at 483.

87. *Martin*, 121 A.D.3d 90 at 103, 900 N.Y.S.2d at 483.

88. *Id.*

89. *Id.*

aimed at new or different audiences.<sup>90</sup> The court ruled:

Had the columns remained on the Daily News website as was intended, their presence there three years later would not have justified any additional action. Their inadvertent deletion during a changeover to a new computer content-management system, and their restoration once that inadvertent deletion was discovered was not geared toward reaching a new audience. The columns were not modified in any substantial way, and their restoration was, as characterized by the motion court, akin to a delayed circulation of the original.<sup>91</sup>

A plaintiff who “thrust herself to the forefront of [a] public controversy in the hope of influencing her reinstatement and/or the board members’ resignations” was a limited purpose public figure, the appellate division ruled in *Perez v. Violence Intervention Program*.<sup>92</sup> The plaintiff had held a position with the Board of Directors of the Violence Intervention Program and had written an open letter to the organization, held a press conference, granted interviews, answered questions, posed for photographs, and “took affirmative steps to attract public attention.”<sup>93</sup> As a limited purpose public figure, the plaintiff was held to the actual malice standard to prove a defamatory statement, which the court held she failed to do.<sup>94</sup>

An advertisement critical of an animal rights group was not defamatory because the plaintiffs could not establish actual malice, the appellate division held in *Humane League of Philadelphia, Inc. v. Berman & Co.*<sup>95</sup> The 2008 advertisement, which ran in *The New York Times*, alleged that the plaintiffs had been involved in criminal activity and animal abuse.<sup>96</sup> As a group that “thrust itself” into public controversies with the intent to influence public policy, the court ruled that the company and its officers should be regarded as public figures and required to prove actual malice.<sup>97</sup> The plaintiffs failed to show that the “defendants had serious doubts about the truth of any of the statements,” much less knowingly published false statements.<sup>98</sup>

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90. *Id.*

91. *Id.* at 104, 900 N.Y.S.2d at 484.

92. 116 A.D.3d 601, 601-02, 984 N.Y.S.2d 348, 349 (1st Dep’t 2014).

93. *Id.* at 601, 984 N.Y.S.2d at 349.

94. *Id.* at 601-02, 984 N.Y.S.2d at 349.

95. 108 A.D.3d 417, 418, 969 N.Y.S.2d 35, 37 (1st Dep’t 2013).

96. *Id.*

97. *Id.*

98. *Id.* at 419, 969 N.Y.S.2d at 38.

## IV. DEFAMATION—OPINION

Determining whether a statement is that of fact or opinion is vital to satisfying the elements of the tort and sustaining a claim.

A newspaper article characterizing the plaintiffs as hecklers at a confirmation meeting for a judge was not libelous, the appellate division ruled in *Sassower v. Gannett Co.*<sup>99</sup> A local newspaper covered the public meeting and published articles about the event in both the newspaper and its sister website.<sup>100</sup> The language used in the news coverage was “nonactionable opinion, rather than fact” and properly dismissed, even though the articles “failed to include and recount certain information as desired by the plaintiffs.”<sup>101</sup>

## V. DEFAMATION—PRIVILEGE

The “fair and true” report under New York Civil Rights Law section 74<sup>102</sup> immunized defendants in a number of cases.

Newspaper articles alleging corruption based on facts drawn from court papers were privileged, and the libel suit disputing the findings was properly dismissed, the appellate division ruled in *Russian American Foundation, Inc. v. Daily News L.P.*<sup>103</sup> The allegations also appeared on the newspaper’s website and in the digital edition.<sup>104</sup> The plaintiffs were a non-profit organization promoting Russian culture and its president and other officials were linked to a political corruption scandal involving a New York State Senator.<sup>105</sup>

Though the newspaper published blunt descriptions of the alleged corruption, it did so based on reporting from court papers, specifically an FBI affidavit.<sup>106</sup> The lower court dismissed the case and the appellate division affirmed, holding, “[i]t is undisputed that all statements claimed to be libelous are part of a ‘report of a judicial proceeding.’”<sup>107</sup> Further, other claims in the suit failed because “the article is a quintessential example of the type of speech that Civil Rights Law § 74 was intended to

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99. 109 A.D.3d 607, 608, 972 N.Y.S.2d 41, 43 (2d Dep’t 2013); *see also* *Sassower v. Gannett Co.*, No. 10-12596, 2011 N.Y. Slip Op. 32872(U), at 1 (Sup. Ct. Suffolk Cnty. 2011) (dismissing the libel suit pursuant to CPLR 3211(a)(7) for failure to state a claim).

100. *Sassower*, 109 A.D.3d at 608, 972 N.Y.S.2d at 43.

101. *Id.*

102. N.Y. CIV. RIGHTS LAW § 74 (McKinney 2014).

103. 109 A.D.3d 410, 410, 970 N.Y.S.2d 216, 216 (1st Dep’t 2013).

104. *Id.* at 411, 970 N.Y.S.2d at 217.

105. *Id.*

106. *Id.* at 412-13, 970 N.Y.S.2d at 218.

107. *Id.* at 412, 970 N.Y.S.2d at 218.

protect.”<sup>108</sup>

A television reporter’s coverage of a lawsuit by a California transgender person against a Department of Motor Vehicles official who sent threatening materials through the mail was properly dismissed as a fair and accurate report of a judicial proceeding, the appellate division held in *Dimond v. Time Warner, Inc.*<sup>109</sup> The plaintiff objected to CNN reporter Jane Velez-Mitchell’s characterization of him as a someone who believed “homosexuals should be put to death” after he was linked to mailing a transgender citizen anti-homosexual materials after he obtained information about the person through his position with the California Department of Motor Vehicles.<sup>110</sup> The lower court had dismissed the case because the reporter did not adequately identify the plaintiff and relied on judicial papers for the report.<sup>111</sup> The reporter’s comments were “absolute[ly] privilege[d]” under Civil Rights Law section 74.<sup>112</sup>

#### VI. DEFAMATION—ONLINE IMMUNITY AND THE COMMUNICATIONS DECENCY ACT, SECTION 230

Websites had immunity under provisions of the federal Communications Decency Act of 1996, § 230 in defamation cases in both the state and federal systems.<sup>113</sup> Under § 230, interactive computer services will not be held liable for tortious content created, written, or otherwise posted by third parties.<sup>114</sup>

In *Braverman v. YELP, Inc.*, a state court dismissed a second and third round of litigation by a dentist who was the subject of negative reviews and postings on the gripe website.<sup>115</sup> The court applied a three-prong analysis, established by the Court of Appeals in *Shiamilli v. Real Estate Group of New York, Inc.*, to determine § 230 immunity: 1) is the defendant an interactive computer service?; 2) does the plaintiff seek to hold the defendant liable as a publisher or speaker?; and 3) is the litigation based on information provided by another information content provider?<sup>116</sup>

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108. *Russian Am. Found., Inc.*, 109 A.D.3d at 413, 970 N.Y.S.2d at 218.

109. 119 A.D.3d 1331, 1331-32, 989 N.Y.S.2d 727, 728 (4th Dep’t 2014).

110. *Id.* at 1332, 989 N.Y.S.2d at 728.

111. *Id.*

112. *Id.* at 1332, 989 N.Y.S.2d at 729.

113. 47 U.S.C. § 230 (2012).

114. *Id.*

115. No. 155629/12, 2013 N.Y.Slip Op. 31407(U), at 2 (Sup. Ct. N.Y. Cnty. 2013); *Braverman v. Yelp, Inc.*, No. 158299/2013, 2014 N.Y.Slip Op. 30444(U), at 1 (Sup. Ct. N.Y. Cnty. 2014); see also, Roy S. Gutterman, *Media Law, 2012-13 Survey of New York Law*, 64 SYRACUSE L. REV. 867, 880-81 (2014).

116. *Braverman*, No. 155629/12, 2013 N.Y.Slip Op. 31407(U), at 5 (citing *Shiamilli v.*

“Yelp is entitled to immunity because this action is based on reviews written by other content providers—Yelp users—and not based on any content that Yelp itself created or developed,” the court wrote.<sup>117</sup>

Similarly, a federal court dismissed the web-hosting site Go Daddy from a defamation claim by a Teamster suing his former union for posting defamatory statements about him and his family in newsletters.<sup>118</sup> Go Daddy, as a web-hosting website that played no editorial role with the two newsletter postings, had immunity under § 230, the court held.<sup>119</sup> The court also noted that a site such as Go Daddy has no responsibility to remove content, especially when it does not exercise control of content posted by third-parties.<sup>120</sup> The court wrote:

Since an interactive computer service cannot be treated as a publisher of third party content, even under the liberal standard of review for pro se pleadings, Plaintiffs’ claim fails to establish that Go Daddy is liable for merely failing to remove the newsletters posted by individuals other than Go Daddy.<sup>121</sup>

## VII. DEFAMATION–MISCELLANEOUS

### A. Jurisdiction and Choice of Law

A complicated defamation suit that found its way into the Southern District despite having minimal contacts within the state was dismissed by the court applying Nevada substantive law, the court ruled in *Adelson v. Harris*.<sup>122</sup> Here, the plaintiff, an international casino magnate who lived in Nevada and donated large sums of money to Republican political campaigns, sued a Democratic-leaning public interest organization that operates a website.<sup>123</sup> The multiple defendants were domiciled in Washington, D.C. and Texas.<sup>124</sup> A reference on the defendants’ website listed a New York address, which was actually the address of an independent consultant.<sup>125</sup> Nevertheless, without any formal objections in papers, the court retained the case based on consent to personal

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Real Estate Grp. Of N.Y., Inc., 17 N.Y.3d 281, 286-87, 952 N.E.2d 1011, 1015, 929 N.Y.S.2d 19, 23 (2011)).

117. *Id.* at 6.

118. *Ricci v. Teamsters Union Local 456*, No. 13 CV-07729 (NSR), 2014 U.S. Dist. LEXIS 59414, at \*2, \*13 (S.D.N.Y. Apr. 28, 2014).

119. *Id.* at \*7-9.

120. *Id.* at \*9.

121. *Id.*

122. 973 F. Supp. 2d 467, 471 (S.D.N.Y. 2013).

123. *Id.* at 471-73.

124. *Id.* at 472.

125. *Id.* at 472 n.2.

jurisdiction within the district.<sup>126</sup>

To simplify the complicated factual dispute, the substantive legal question related to the defamatory impact of statements published on the defendants' website alleging the plaintiff's involvement in prostitution in foreign jurisdictions and alleged efforts to use "dirty money" to influence politics.<sup>127</sup> The defendants, on the other hand, filed motions to dismiss based on Federal Rule of Civil Procedure 12(b)(6) as protected opinion and a fair and accurate report of a public record and both Washington, D.C.'s and Nevada's Anti-SLAPP statutes.<sup>128</sup>

Thus, the choice of law question the court wrestled with focused on which state's substantive law should apply: New York, Washington, D.C., Texas, or Nevada.<sup>129</sup>

The court noted that the statements in question here were essentially "published nationally."<sup>130</sup> Much of the court's discussion analyzed a long-established libel choice of law case, *Davis v. Costa-Gavras*,<sup>131</sup> which calls for applying New York substantive law in cases involving out-of-state plaintiffs suing New York domiciled defendants.<sup>132</sup> But because the plaintiff was domiciled in Nevada, the court held Nevada law should apply.<sup>133</sup> The key portion of the rationale, stated:

Nevada's interest in this case is significant and incontrovertible. Adelson is a Nevada citizen, and the Adelson business empire is based in Nevada. Nevada has an interest in protecting its citizens from tortious conduct. The District of Columbia also has an interest in this case—protecting the First Amendment rights of its citizens. While this interest is important, it is not without more, sufficient to overcome the presumption that the law of Plaintiff's domicile should apply in this type of case.<sup>134</sup>

The court could not find a comparable interest in either Washington, D.C. or New York.<sup>135</sup> Nor were the defendants able to rebut the presumption that Nevada had the greatest interest in the litigation, requiring that state's law to apply.<sup>136</sup> The rest of the court's lengthy

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126. *Id.*

127. *Adelson*, 973 F. Supp. 2d at 473-74.

128. *Id.* at 471, 475, 486-87.

129. *Id.* at 475-81.

130. *Id.* at 477.

131. 580 F. Supp. 1082 (S.D.N.Y. 1984).

132. *Adelson*, 973 F. Supp. 2d at 477 (discussing *Davis*, 580 F. Supp. at 1091).

133. *Id.* at 477-78 (citing *Davis*, 580 F. Supp. at 1091).

134. *Id.* (citing *Davis*, 580 F. Supp. at 1091).

135. *Id.* at 479-80.

136. *Id.* at 481.



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opinion applied Nevada's defamation law,<sup>137</sup> privilege defenses,<sup>138</sup> test for accuracy in the reporting,<sup>139</sup> standards for protected opinion,<sup>140</sup> and Anti-SLAPP statute<sup>141</sup> to dismiss the claims.<sup>142</sup>

A state trial court refused to seat a case by an out-of-state business against a ratings website that provided a negative review of the company, a trial court ruled in dismissing the claims.<sup>143</sup> No parties had sufficient ties to the jurisdiction, thus facilitating dismissal under CPLR 301 and 302.<sup>144</sup> With no assets, residency, offices, employees, or sufficient business ties to New York, the defendant should not be held to New York's jurisdiction.<sup>145</sup> The court wrote: "[Better Business Bureau] publishes a website that is accessible to persons in New York (and around the world), this sort of incidental contact is not sufficient to establish general jurisdiction under CPLR 301 . . . ." <sup>146</sup> Similarly, aspects of New York's long-arm statute require more than a single transaction, such as viewing a "passive" website within the jurisdiction to seat a case in New York.<sup>147</sup>

*B. Statute of Limitations*

In an interesting case ruling on social media, a Facebook rant imputing a range of criminal and immoral behavior about the plaintiff was time-barred under New York's one-year statute of limitations, a trial court ruled.<sup>148</sup> Litigants in this case had met online and engaged in a relationship that ended on bad terms with defendant posting numerous "highly unfavorable statements" about plaintiff on Facebook, internet blogs, and through emails.<sup>149</sup> Those statements published in 2012 were time-barred under CPLR 215, which sets the statute of limitations for libel at one year.<sup>150</sup>

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137. *Adelson*, 973 F. Supp. 2d at 481-82.

138. *Id.* at 482-86.

139. *Id.* at 486-87.

140. *Id.* at 487-91.

141. *Id.* at 493-96 (applying NEV. REV. STAT. § 41.660 (2014)).

142. *Adelson*, 973 F. Supp. 2d at 504.

143. *Steinmetz v. Energy Automation Sys., Inc.*, No. 500554/13, 2014 N.Y. Slip Op. 50566(U), at 28 (Sup. Ct. Kings Cnty. 2014).

144. *Id.* at 10 (citing N.Y. C.P.L.R. 301, 302 (McKinney 2014)).

145. *Id.* at 14-16.

146. *Id.* at 15 (citing N.Y. C.P.L.R. 301).

147. *Id.* at 20 (citing *Paterno v. Laser Spine Inst.*, 112 A.D.3d 34, 41, 973 N.Y.S.2d 681, 686 (2d Dep't 2013)).

148. *Wender v. Silberling*, No. 160505/13, 2014 Slip Op. 31770(U), at 1-2 (Sup. Ct. N.Y. Cnty. 2014).

149. *Id.*

150. *Id.* (citing N.Y. C.P.L.R. 215).

The defendant, however, crafted a posting she wrote as an autobiographical poem in the plaintiff's name, which imputed a range of immoral activity including adultery, criminal activity including rape and domestic violence and imputation of a sexually-transmitted disease, was published within the statute of limitations and required the court to weigh the content in relation to the "culture" of the Internet.<sup>151</sup>

An online literary impersonation, as the court characterized this to be, was sufficient to establish a viable defamation action.<sup>152</sup> "Here, plaintiff alleges that defendant published the false, confessional autobiography attributed to plaintiff. . . . Accordingly, the website impersonating plaintiff is clearly sufficient to form the basis of a cause of action for defamation."<sup>153</sup>

A series of newspaper and wire service articles covering contentious litigation between a former couple were not liable for defamation because the one-year statute of limitations had expired.<sup>154</sup> The complaint was also dismissed because the news coverage constituted a privileged fair and accurate report of judicial proceedings.<sup>155</sup>

The plaintiff brought defamation claims against the Associated Press, *Forbes*, News Corp, which publishes the *New York Post*, and *The Daily Beast*, an online news website.<sup>156</sup> He claimed that the publications defamed him by describing his behavior as obsessive, stalking and harassing.<sup>157</sup> These details were drawn almost entirely from court papers filed between the plaintiff and his former lover.<sup>158</sup>

Under New York's CPLR section 215(3), defamation claims must be brought within one year of publication.<sup>159</sup> The claims against all but *The Daily Beast* were dismissed because they were brought more than a year after the statute of limitations—the articles were originally published September 2012 and the plaintiff brought his suit in October 2013.<sup>160</sup>

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151. *Id.* at 6-7, 12-13. Among some of the more restrained statements in the rant, the plaintiff is identified as "a sociopath and narcissist," a "freight train of destruction," a "deviant," and many more unflattering negative assessments. *Id.*

152. *Wender*, No. 160505/13, 2014 NY Slip Op. 31770(U), at 8.

153. *Id.*

154. *Moss v. Associated Press*, No. 158705/2013, 2014 NY Slip Op. 31546(U), at 1-2, 4-5 (Sup. Ct. N.Y. Cnty. 2014).

155. *Id.* at 5 (citing N.Y. CIV. RIGHTS LAW § 74 (McKinney 2014)).

156. *Id.* at 2-3.

157. *Id.* at 2.

158. *Id.* at 1-2.

159. *Moss*, 2014 NY Slip Op. 31546(U), at 5 (citing N.Y. C.P.L.R. 215(3) (McKinney 2014)).

160. *Id.* at 5-6.

Further, because the news articles were based on court filings, the court held they were privileged as fair and accurate reports.<sup>161</sup> The court wrote:

Additionally, the content of the Daily Beast article is immune from suit as it was a fair and true report of the September Litigation, which was a judicial proceeding. Although the article is styled in a first person narrative form, its contents pertain exclusively to the September Litigation and the writer does not suggest any more serious conduct on the part of Moss than is alleged in the Franklin Complaint.<sup>162</sup>

### C. Procedural

Anonymous blog postings on a website critical of a candidate for local office were not sufficiently defamatory to compel disclosure of the writer's identity, the appellate division held in two nearly identical opinions in two related cases emerging from the same postings in *In re Konig v. CSC Holdings, LLC*<sup>163</sup> and *In re Konig v. WordPress.com*.<sup>164</sup>

The plaintiff filed a motion for pre-action disclosure under CPLR section 3102(c) in order to discover the proper defendant for the planned defamation lawsuit.<sup>165</sup> A blogger who wrote under the pseudonym "Q-Tip" posted statements about plaintiff, a candidate for the Westchester County Board of Legislators on a blog, *Watch Croton*.<sup>166</sup> Specifically, the plaintiff argued that her reputation was harmed and her candidacy for office damaged by a post titled, "Would You Buy a Used Car from These Men?"<sup>167</sup> A successful prima facie showing would have prompted the trial court to compel disclosure.<sup>168</sup> The lower court improperly compelled disclosure, the appellate division held, because:

Here, given the context in which the challenged statements were made, on an Internet blog during a sharply contested election, a reasonable reader would have believed that the generalized reference to "downright criminal actions" in a post . . . was merely conveying opinion, and was not a factual accusation of criminal conduct.<sup>169</sup>

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161. *Id.* at 6.

162. *Id.*

163. 112 A.D.3d 934, 934, 936, 977 N.Y.S.2d 756, 757, 759 (2d Dep't 2013).

164. 112 A.D.3d 936, 936-37, 978 N.Y.S.2d 92, 93-94 (2d Dep't 2013).

165. *CSC Holdings, LLC*, 112 A.D.3d at 934, 977 N.Y.S.2d at 757-58. *See* N.Y. C.P.L.R. 3102(c) (McKinney 2014) (allowing a party to seek disclosure prior to bringing a civil action to assist in identifying the proper defendant or to preserve information).

166. *CSC Holdings, LLC*, 112 A.D.3d at 934, 977 N.Y.S.2d at 758.

167. *Id.* at 934-35, 977 N.Y.S.2d at 758.

168. *Id.* at 935, 977 N.Y.S.2d at 758.

169. *Id.*

*D. Miscellaneous*

A dispute over an article in a peer-reviewed scientific journal was a matter of opinion rather than defamation or a violation of federal trademark law, the Second Circuit ruled in *ONY, Inc. v. Cornerstone Therapeutics, Inc.*<sup>170</sup> This case with multiple defendants—a competing company, physicians, authors and editors of the journal—involved competing biotechnology companies which each produced a biological material that lines the surface of the human lungs and facilitates respiration, particularly in infants with Respiratory Distress Syndrome.<sup>171</sup>

The article at issue here was based on scientific data primarily sponsored by the defendant, which raised questions about the efficacy of plaintiff's product.<sup>172</sup> The plaintiff argued that in addition to defaming its company, the article also damaged the company's reputation under provisions of the Lanham Act and New York's General Business Law section 349.<sup>173</sup> Specifically, the plaintiff relied on provisions of the Lanham Act that offer a civil remedy for false advertising, which includes false or misleading statements of fact or descriptions in the course of interstate commerce.<sup>174</sup> Because the claims arise out of a scientific article, the court was cognizant of the First Amendment implications of the law.<sup>175</sup>

The court affirmed dismissal of the lawsuit under the First Amendment principles associated with protected opinion.<sup>176</sup> Because statements of pure opinion cannot be proven either true or false, they lack the requisite falsity required under libel law.<sup>177</sup> The role of testing the truth and veracity of data, particularly scientific research, requires some protection for the scientific analysis, the court held, deferring to the opinions of the scientists in peer-reviewed journals while the "scientific public sits as the jury."<sup>178</sup> The court further wrote:

Where, as here, a statement is made as part of an ongoing scientific discourse about which there is considerable disagreement, the traditional dividing line between fact and opinion is not entirely helpful. It is clear to us, however, that while statements about contested and

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170. 720 F.3d 490, 492, 497 (2013).

171. *Id.* at 492-93.

172. *Id.* at 493.

173. *Id.* at 492.

174. *Id.* at 496 (quoting 15 U.S.C. § 1125(a)(1) (2012)).

175. *ONY, Inc.*, 720 F.3d at 496.

176. *Id.* at 496-99 (applying *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-20 (1990)).

177. *Id.* at 496.

178. *Id.* at 497.

contestable scientific hypotheses constitute assertions about the world that are in principle matters of verifiable “fact,” for purposes of the First Amendment and the laws relating to fair competition and defamation, they are more closely akin to matters of opinion, and are so understood by relevant scientific communities.<sup>179</sup>

The court concluded that the article was “non-actionable scientific conclusions” and not subject to liability under any of the statutes or common law torts plaintiffs invoked.<sup>180</sup>

A plastic surgeon who treated a reality television star on the show *Mob Wives* was unable to bring a successful defamation, libel per se, invasion of privacy, and tortious interference case against the show’s producers because he knowingly signed a release, a trial court held.<sup>181</sup> Here, the plaintiff’s medial treatment of one of the show’s “reality stars,” Renee Graziano, was the subject of segments on the show, as well as some colorful descriptions of complications following the surgery, which she said was a “plastic surgery nightmare;” the surgery caused her to “flat-line[],” and she “almost died.”<sup>182</sup>

Though the plaintiff presented a number of tort-based causes of action, the court dismissed them all because he not only willingly participated in the television show, but did so after signing a voluntary appearance release.<sup>183</sup> Through the release, the plaintiff waived his rights to sue the signatories, its assignees, or subsidiaries for, among other things, “all manner of liabilities” arising out of the program.<sup>184</sup>

Applying contract interpretation doctrines to analyze the dispute, the court found the contract’s provisions to be “sufficiently clear and unambiguous.”<sup>185</sup> Even from a negligence standpoint, the contract held up, the court ruled.<sup>186</sup> The court wrote:

The nature of the [a]pppearance [r]elease is straight forward and simply intended to prohibit lawsuits arising from the appearance of a participant in a reality television show. There is no special relationship between Dr. Klapper and the producers of *Mob Wives*. No bodily injury is alleged and there is no claim that plaintiff was coerced or fraudulently

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179. *Id.*

180. *ONY, Inc.*, 720 F.3d at 498.

181. *Klapper v. Graziano*, 41 Misc. 3d 401, 402, 404, 410, 970 N.Y.S.2d 355, 357, 358, 363 (Sup. Ct. Kings Cnty. 2013).

182. *Id.* at 404, 970 N.Y.S.2d at 358.

183. *Id.* at 410, 970 N.Y.S.2d at 363.

184. *Id.* at 406, 970 N.Y.S.2d at 359-60 (citation omitted).

185. *Id.* at 406-07, 970 N.Y.S.2d at 360-61.

186. *Klapper*, 41 Misc. 3d at 407, 970 N.Y.S.2d at 360-61.

induced to sign the Appearance Release.<sup>187</sup>

In its conclusion, the court found that the defendants did not engage in any intentional or malicious activities intended to injure plaintiff and found no public policy justification to void the contract.<sup>188</sup> While reality television is a “relatively recent phenomenon,”<sup>189</sup> the court looked to a body of contract law involving movie and television releases, which almost universally come down in the entertainers’ favor.<sup>190</sup>

The court also commented on the rise of so-called reality television shows and their potential for liability, writing, “[s]eemingly wildly popular, this genre offers opportunities for embarrassing and insulting participants and the more outlandish the conduct, the higher the ratings. There does not seem to be a bottom to the viewing public’s appetite for this brand of entertainment.”<sup>191</sup>

#### VIII. INVASION OF PRIVACY

New York Civil Rights Law sections 50-51 govern the tort of invasion of privacy.<sup>192</sup>

A temporary restraining order seeking to block production of a film based on a high-profile murder trial was an impermissible and unconstitutional prior restraint, the appellate division held in *Porco v. Lifetime Entertainment Services, LLC*.<sup>193</sup> The plaintiff, who had been convicted of murdering his parents, invoked New York’s invasion of privacy statute, Civil Rights Law sections 50 and 51, in his attempt to block a film based on his case, *Romeo Killer: The Christopher Porco Story*.<sup>194</sup>

The court did not rule on the substance of the underlying privacy lawsuit; instead it focused entirely on the appropriateness of a temporary restraining order as a prior restraint or a form of pre-publication censorship, which is presumed to be unconstitutional under the First

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187. *Id.* at 407, 970 N.Y.S.2d at 360-61.

188. *Id.* at 410, 970 N.Y.S.2d at 362-63.

189. *Id.* at 405, 970 N.Y.S.2d at 359.

190. *Id.* at 407, 970 N.Y.S.2d at 361. *See, e.g.*, *Psenicska v. Twentieth Century Fox Film Corp.*, No. 07 Civ. 10972 (LAP), No. 08 Civ. 1571 (LAP), No. 08 Civ. 1828 (LAP), 2008 U.S. Dist. LEXIS 69214, at \*3 (S.D.N.Y. Sept. 3, 2008) (holding no liability against producers of the movie *Borat*); *see also* Roy S. Gutterman, *Media Law, 2008-09 Survey of New York Law*, 60 SYRACUSE L. REV. 1041, 1051 (2010).

191. *Klapper*, 41 Misc. 3d at 405, 970 N.Y.S.2d at 359. The court also noted in a footnote that it deliberately avoided viewing the program in question. *Id.* at 405 n.2.

192. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 2014).

193. 116 A.D.3d 1264, 1265, 984 N.Y.S.2d 457, 458 (3d Dep’t 2014).

194. *Id.* at 1265, 1266, 984 N.Y.S.2d at 458, 459.

Amendment.<sup>195</sup> Applying a string of well-established anti-censorship precedents by the United States Supreme Court, including *New York Times Co. v. United States*<sup>196</sup> and *Nebraska Press Ass'n v. Stuart*,<sup>197</sup> the court reiterated that prepublication censorship is justifiable only in “exceptional cases” where there is a risk of serious harm.<sup>198</sup>

The court was forceful in declaring the trial court’s grant of the TRO invalid, stating that if any tortious liability would be assessed against producers of the film, it would have to be after publication or broadcast.<sup>199</sup> “That portions of the movie may be fictionalized, dramatized or embellished does not constitute a sufficient basis for the imposition of a prior restraint enjoining its broadcast,” the court wrote.<sup>200</sup>

The court added that “[w]hile judicial redress following publication is available if it is ultimately proven that defendant abused its rights of speech, it was constitutionally impermissible under these circumstances to forbid that speech prior to its actual expression.”<sup>201</sup>

Similarly, a preliminary injunction sought against a photographer who used a telephoto lens to photograph unsuspecting neighbors, including their children, through their open windows, was rejected by a trial court.<sup>202</sup> The suit, based on New York’s privacy law, New York Civil Rights Law sections 50 and 51, attempted to block publication of the photos that were in an exhibit, “The Neighbors,” and also available for sale.<sup>203</sup> The plaintiffs argued that they did not consent to being photographed and objected to some of their children appearing in the photo exhibit, sometimes subjects were “partially clad.”<sup>204</sup>

The court had to consider whether the plaintiffs met the standards for the injunction—likelihood of success on the merits, irreparable harm and equitable considerations—while also deciding whether the photography would be considered either newsworthy or artwork

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195. *Id.* (citing *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976)).

196. 403 U.S. 713, 723-24 (1971) (Douglas, J., concurring) (known as the Pentagon Papers, the First Amendment barred the government’s attempt to block publication of newspaper articles based on classified government documents).

197. 427 U.S. 539, 559-60 (1976) (holding “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights”).

198. *Porco*, 116 A.D.3d at 1265-66, 984 N.Y.S.2d at 458-59 (quoting *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 716 (1931)).

199. *Id.* at 1266, 984 N.Y.S.2d at 459.

200. *Id.*

201. *Id.*

202. *Foster v. Svenson*, No. 651826/2013, 2013 N.Y. Slip Op. 31782(U), at 1, 6 (Sup. Ct. N.Y. Cnty. 2013).

203. *Id.* at 1-2.

204. *Id.*

protected under the First Amendment.<sup>205</sup>

New York has a narrow definition of “invasion of privacy,” and restricts recovery under the statute to legitimate commercial or advertising enterprises.<sup>206</sup> Likewise, courts also have a liberal interpretation of “newsworthiness,” which provides a viable privilege from liability.<sup>207</sup> Even though the photographs in question were available for purchase, the court did not believe that converted them into purely commercial.<sup>208</sup> The court wrote: “‘The Neighbors’ exhibition is a legitimate news item because cultural attractions are matters of public and consumer interest. Therefore, news agencies and television networks are entitled to use Defendant’s photographs of Plaintiffs, which have a direct relationship to the news items—the photos are the focus of newsworthy content.’”<sup>209</sup> The court concluded:

Lastly, a balance of the equities does not favor granting the injunction. While it makes Plaintiffs cringe to think their private lives and images of their small children can find their way into the public forum of an art exhibition, there is no redress under the current laws of the State of New York. Simply, an individual’s right to privacy under the New York Civil Rights Law sections 50 and 51 yield to an artist’s protections under the First Amendment under the circumstances presented here.<sup>210</sup>

Gold medal Olympic figure skater Oksana Baiul’s multi-party, multi-count trademark infringement, invasion of privacy, and libel suit against a television production company and the NBC Universal television network was dismissed by a federal court.<sup>211</sup>

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205. *Id.* at 3-4 (citing N.Y. C.P.L.R. 6301 (McKinney 2014); *Doe v. Axelrod*, 73 N.Y.2d 748, 750, 532 N.E.2d 1272, 1272, 536 N.Y.S.2d 44, 45 (1988); *Messenger v. Gruner + Jahr Printing & Publ’g*, 94 N.Y.2d 436, 441, 727 N.E.2d 549, 552, 706 N.Y.S.2d 52, 55 (2000); *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 346 (S.D.N.Y. 2002)).

206. *Id.* at 3 (citing *Messenger*, 94 N.Y.2d at 441, 727 N.E.2d at 552, 706 N.Y.S.2d at 55).

207. *Foster*, No. 651826/2013, 2013 N.Y. Slip Op. 31782(U), at 4-5 (citing *Messenger*, 94 N.Y.2d at 441, 727 N.E.2d at 552, 706 N.Y.S.2d at 55; *Stephano v. News Grp. Publ’ns, Inc.*, 64 N.Y.2d 174, 184, 474 N.E.2d 580, 585, 485 N.Y.S.2d 220, 225 (1984); *Arrington v. N.Y. Times Co.*, 55 N.Y.2d 433, 440, 434 N.E.2d 1319, 1322, 449 N.Y.S.2d 941, 944 (1982); *Hoepker*, 200 F. Supp. 2d at 348-50).

208. *Id.* at 5 (citing *Hoepker*, 200 F. Supp. 2d at 354).

209. *Id.* (internal citations omitted).

210. *Id.* at 6.

211. *Baiul v. NBCUniversal Media, LLC*, 13 Civ. 2205 (KBF), 13 Civ. 2208 (KBF), 2014 U.S. Dist. LEXIS 57474, at \*2-3 (S.D.N.Y. Apr. 24, 2014). While the court engaged in a fine recitation of the elements of libel under New York law, this cause of action was not linked in any way to NBC and stemmed from statements published by one of the parties in newspaper articles about the plaintiff’s intellectual property lawsuit. *Id.* at \*49-55. This claim was also dismissed. *Id.* at \*55.



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Summarizing the complicated factual background, Baiul objected to a press release and some broadcast statements linking her to a series of televised figure skating shows produced by a third-party company, which paid NBC to broadcast the shows in 2010, 2011, and 2012.<sup>212</sup> The plaintiff claimed that this violated her rights under both the Federal Lanham Act and New York's invasion of privacy statutes, N.Y. Civil Rights Law sections 50 and 51.<sup>213</sup> Both statutes require proof of an unauthorized commercial use.<sup>214</sup>

The publication and distribution of a 2012 press release linking the plaintiff to the television shows became a critical point, which the court refused to equate with commercial use under the law.<sup>215</sup> The court did not characterize the press releases as commercial or violating the Lanham Act.<sup>216</sup> The court's most critical discussion included:

Finally, with respect to the Press Release, Baiul also fails to create a genuine issue of material fact for trial as to liability under the Lanham Act because the NBC Defendants did not use the Press Release in commerce. The record evidence establishes that the Press Release was issued on February 2, 2012 and posted on Media Village, a website used to provide United States-based media with information about upcoming NBC broadcasts. Media Village is not targeted to the television viewing audience, advertisers or the general public; full access to the site requires registration with United States media credentials. The NBC Defendants played no role in selling advertisements against the Moments of Love Show broadcast and, because the Press Release was published approximately 48 hours before the broadcast, could have had no effect on Disson's advertising sales (which were required to be submitted to NBC for standards review at least 72 hours prior to broadcast).<sup>217</sup>

For similar reasons, the New York invasion of privacy claims under Civil Rights Law sections 50 and 51 failed.<sup>218</sup>

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212. *Id.* at \*10-14.

213. *Id.* at \*2.

214. *Baiul*, 13 Civ. 2205 (KBF), 13 Civ. 2208 (KBF), 2014 U.S. Dist. LEXIS 57474, at \*37, \*46-47 (citing 15 U.S.C. § 1125(a)(1) (2012); 1-800 Contacts, Inc. v. WhenU.Com, Inc., 414 F.3d 400, 407 (2d Cir. 2005)). The Lanham Act, 15 U.S.C. § 1125(a), also known as section 43(a), prohibits the false designation or any use that may cause confusion that would lead someone to be falsely linked to a commercial use, sponsorship, or advertisement. *Id.* at \*35.

215. *Id.* at \*22-31, \*39-40.

216. *Id.* at \*39-40.

217. *Id.*

218. *Baiul*, 13 Civ. 2205 (KBF), 13 Civ. 2208 (KBF), 2014 U.S. Dist. LEXIS 57474, at \*47-48.

A lingerie model whose photographs were reposted on gossip websites without her consent could bring an invasion of privacy claim against at least one of the websites because of factual errors in the accompanying article, the Eastern District ruled.<sup>219</sup> The court dismissed claims against two other gossip websites, Bossip and Modelmayhem, because their uses of the photographs, while unauthorized, lacked the requisite commercial or trade use intent under the statute.<sup>220</sup> The court noted that the public interest in celebrity gossip may be a valid public interest.<sup>221</sup>

Ruling on the Rule 12(b)(6) motion and analyzing New York's privacy laws, the court rejected the defendant website, Media Takeout's, motion to dismiss arguing that published errors, described as "undisputedly false," about the plaintiff in the published text vitiated the website's newsworthiness privilege and defense.<sup>222</sup> "At this juncture, the [c]ourt cannot conclude as a matter of law that Media Takeout is shielded from [s]ection 51 liability under the newsworthiness exception. This is not to say that Edme will be successful on her [s]ection 51 claim," the court held.<sup>223</sup>

#### IX. OTHER TORTS—INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Invasion of privacy claims against a television network which broadcasted a documentary-style show of emergency room doctors treating a patient who died on the program were dismissed by a trial court in *Chanko v. American Broadcasting Co.*<sup>224</sup> The plaintiffs, surviving family members of the man who sought treatment for injuries at the hospital, the situs of the television show, were not successful in their privacy claims under both New York state's privacy law, sections 50 and 51, which requires a commercial element to the claim, and the plaintiffs' attempt to shoehorn in a common law claim for privacy under the intrusion theory, which New York does not recognize.<sup>225</sup> The court reviewed the DVD of the show, *NY Med*, which was broadcast and available on-demand, noting the plaintiffs and the deceased were not

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219. *Edme v. Internet Brands, Inc.*, 968 F. Supp. 2d 519, 521-22, 529-30 (E.D.N.Y. 2013).

220. *Id.* at 530-31.

221. *Id.* at 529.

222. *Id.* at 529-30 (citing *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 132 (2d. Cir. 1984); *Davis v. High Soc'y Magazine, Inc.*, 90 A.D.2d 374, 381, 457 N.Y.S.2d 308, 314 (2d Dep't 1982)).

223. *Id.* at 530.

224. No. 152552/13, 2014 N.Y. Slip Op. 30116(U), at 1-2 (Sup. Ct. N.Y. Cnty. 2014).

225. *Id.* at 2-4.

identified or identifiable on the show.<sup>226</sup>

ABC argued that the claims not only lacked merit, but the show should be protected under the First Amendment.<sup>227</sup>

An interesting element to the case involved the plaintiffs' argument that ABC had also breached medical privacy laws through its broadcast.<sup>228</sup> The court wrote:

A cause of action based on privacy cannot be sustained against defendants that are not physicians or staff of a facility that provides health related services. The duty not to disclose confidential information is based on the implied covenant of trust and confidence inherent in the doctor-patient relationship, breach of that duty is actionable as a tort.<sup>229</sup>

However, the court let stand a claim based on intentional infliction of emotional distress.<sup>230</sup> The tort's elements—"“(1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing severe emotional distress; (3) a causal connection between the conduct and injury and; (4) severe emotional distress””—left open a question of fact.<sup>231</sup> The appellate division subsequently dismissed this claim.<sup>232</sup> The appellate division wrote: “Defendants’ conduct in producing and televising a show depicting the medical care provided at defendant hospital that included a pixilated image of plaintiffs’ decedent, who was not identified, was not so extreme and outrageous as to support a claim for intentional infliction of emotional distress.”<sup>233</sup>

In *Phillips v. New York Daily News*, the appellate division reversed a motion to dismiss an action for negligent infliction of emotional distress allegedly tied to a newspaper article quoting the plaintiff.<sup>234</sup> The plaintiff claimed that following publication of quotes attributed to her about a neighbor's fatal child abuse case, she was harassed and threatened by gang members tied to the father of the dead child.<sup>235</sup> In addition to

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226. *Id.* at 2, 4.

227. *Id.* at 3.

228. *Id.* at 2.

229. *Chanko*, No. 152552/13, 2014 N.Y. Slip Op. 30116(U), at 3 (internal citations omitted).

230. *Id.* at 4-5.

231. *Id.* at 3 (quoting *Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 121, 612 N.E.2d 699, 702, 596 N.Y.S.2d 350, 353 (1993)).

232. *Chanko v. Am. Broad. Cos.*, 122 A.D.3d 487, 488, 997 N.Y.S.2d 44, 45 (1st Dep't 2014). This opinion was issued outside the dates for this year's *Survey*, but is included for continuity purposes.

233. *Id.*

234. 111 A.D.3d 420, 420-21, 974 N.Y.S.2d 384, 385 (1st Dep't 2013).

235. *Id.* at 421, 974 N.Y.S.2d at 385.

denying the quotes attributed to her, she claimed that the publication amounted to the negligent infliction of emotional distress.<sup>236</sup>

The appellate division held that the plaintiff failed to establish the basic elements of the tort: extreme and outrageous conduct that “was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”<sup>237</sup> Similarly, the plaintiff’s claim for damages under the prima facie tort also failed.<sup>238</sup>

## X. INTELLECTUAL PROPERTY

### A. Copyright Elements

The Associated Press (“AP”), one of the world’s biggest news organizations, successfully asserted copyright protection over its news articles in a case against a computer subscription service which “scraped” the internet to copy and redistribute news stories in *Associated Press v. Meltwater U.S. Holdings, Inc.*<sup>239</sup>

The AP successfully asserted ownership of its news stories—the organization generates between 1,000 to 2,000 stories every day, distributed to its 1,400 member newspapers and more than 8,000 licensees.<sup>240</sup> Meltwater, on the other hand, is an international company based in Norway, which operated a subscription-based service that used computer programs to scan the internet and copy articles it delivered to its clients.<sup>241</sup> The court issued a detailed opinion and order based on competing motions for summary judgment and declaratory actions.<sup>242</sup>

The AP firmly established ownership of copyrights over its news articles and asserted its “bundle of rights” under the Copyright Act.<sup>243</sup> The AP established its infringement claims by proving it owned valid copyrights and unauthorized copying by Meltwater.<sup>244</sup> The AP could

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236. *Id.*

237. *Id.* (quoting *Berrios v. Our Lady of Mercy Med. Ctr.*, 20 A.D.3d 361, 362, 799 N.Y.S.2d 452, 454 (1st Dep’t 2005)).

238. *Id.* at 421, 974 N.Y.S.2d at 385-86.

239. 931 F. Supp. 2d 537, 540-41 (S.D.N.Y. 2013). This case is the AP’s latest effort to protect its intellectual property against online aggregators and other modern-day pirates. See Roy S. Gutterman, *Media Law, 2008-09 Survey of New York Law*, 60 SYRACUSE L. REV. 1041, 1054-55 (2010) (discussing *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454 (S.D.N.Y. 2009)).

240. *Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d at 541-42, 550.

241. *Id.* at 543.

242. *Id.* at 548, 572.

243. *Id.* at 549-50 (citing 17 U.S.C. § 106 (2013)).

244. *Id.* at 550.

assert rights over reproduction, performance, display, and preparation of derivative works and distribution of copies under the Act, the court recited.<sup>245</sup>

The court wrote: “AP has carried its burden to show its ownership of a valid copyright in the Registered Articles and Meltwater’s copying of protected elements of those works.”<sup>246</sup>

Meltwater, on the other hand, unsuccessfully filed both a counterclaim and affirmative defenses, including fair use,<sup>247</sup> implied license,<sup>248</sup> equitable estoppel,<sup>249</sup> laches,<sup>250</sup> and misuse of copyright.<sup>251</sup>

### B. Fair Use

The prolonged legal saga of the Google Books Library Project, captioned as *Authors Guild v. Google*, was the subject of two important decisions at both the Second Circuit<sup>252</sup> and the district court<sup>253</sup> level after nearly a decade of litigation. While the Second Circuit denied a finding of class action certification for a group of authors in the case,<sup>254</sup> it was also remanded to the district court for a decision on whether Google’s practice of digitally scanning millions of books and making them available via the internet constituted fair use.<sup>255</sup>

The district court opinion discussed numerous public policy benefits of Google’s practice of digitizing millions of books.<sup>256</sup> Portions or “snippets” of the books are searchable and viewable via search engines, a practice that the plaintiffs/authors argued violated provisions of their copyrights on the texts.<sup>257</sup> The court noted that millions of users access Google every day, and the search engine generated more than \$36 billion in revenues in 2011.<sup>258</sup> Among the five extensive policy justifications underlying its decision, the court listed five policy benefits of the Google Books project, including: providing readers with new, searchable and accessible versions of numerous books; an ability to promote research

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245. *Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d at 549 (citing 17 U.S.C. § 106).

246. *Id.* at 550.

247. *Id.* at 550-61.

248. *Id.* at 561-64.

249. *Id.* at 565-66.

250. *Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d at 566-67.

251. *Id.* at 567-69.

252. *Authors Guild, Inc. v. Google Inc.*, 721 F.3d 132 (2d Cir. 2013).

253. *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

254. *Authors Guild, Inc.*, 721 F.3d at 132-35.

255. *Id.* at 134-35.

256. *Authors Guild, Inc.*, 954 F. Supp. 2d at 287-88.

257. *Id.* at 286-88.

258. *Id.* at 285.

and more sophisticated computer-aided research techniques; and preservation of older, rare, or out-of-print books.<sup>259</sup>

However, the substantive portion of the ruling focused on whether Google's practices constituted a fair use under the statute.<sup>260</sup> The four prongs of the fair use defense require a determination based on: 1) "the purpose and character of the use"; 2) "the nature of the copyrighted work"; 3) "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"; and 4) the effect of the use on the market.<sup>261</sup>

Perhaps the most novel finding in the application of the four prongs was the court's discussion under the purpose and character of the use element, which suggested Google's use was "highly transformative,"<sup>262</sup> meaning that by digitizing a massive number of books, Google transformed the underlying materials and added new value to those materials. The court wrote:

Similarly, Google Books is also transformative in the sense that it has transformed book text into data for purposes of substantive research, including data mining and text mining in new areas, thereby opening up new fields of research. Words in books are being used in a way they have not been used before. Google Books has created something new in the use of book text—the frequency of words and trends in their usage provide substantive information.<sup>263</sup>

The court found little authority under the second prong (nature of the works) because the books at issue are both fiction and non-fiction, while the third prong (amount and substantiality) "weighs slightly against" fair use because of the vast amounts of works being copied—entire works of copyrighted books.<sup>264</sup> The fourth prong (effect on the market), the court said could actually benefit the copyright holders because the new, modern access to materials may generate sales of books that scholars or users would not have discovered but for the Google Book Project.<sup>265</sup>

Channeling intellectual property law's Constitutional underpinnings in Article I, Section 8 of the Constitution, the court wrote that Google Books "advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative

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259. *Id.* at 287-88.

260. *Id.* at 289-94 (applying 17 U.S.C. § 107 (2013)).

261. *Authors Guild, Inc.*, 954 F. Supp. 2d at 290 (quoting 17 U.S.C. § 107).

262. *Id.* at 291.

263. *Id.*

264. *Id.* at 292.

265. *Id.* at 292-93.

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individuals, and without adversely impacting the rights of copyright holders.”<sup>266</sup>

Google Books is “an invaluable research tool” for a wide range of users and also “generates new audiences and creates new sources of income for authors and publishers. Indeed, all society benefits.”<sup>267</sup>

A news and financial data service’s unauthorized republication and broadcast of a Swiss company’s earnings reports was deemed a fair use by the Second Circuit in *Swatch Group Management Services v. Bloomberg L.P.*<sup>268</sup> Here, the company objected to Bloomberg’s use and dissemination of a recording of a conference call on the company’s earnings report, a seven-page document, and comments made to more than 130 financial analysts who participated in the conference call.<sup>269</sup> The report was also published on the company’s website under its investor relations section.<sup>270</sup> The conversation was limited to a relatively small group of participants, who agreed to a certain level of confidentiality.<sup>271</sup> Swatch Group and its officers objected to the publication and broadcast of the report and sought to invoke copyright laws as a means of protecting its report and data.<sup>272</sup>

While the underlying question was whether the content was even subject to copyright protection, the court applied a rigorous fair use analysis to justify the complaint’s dismissal under Federal Rule of Civil Procedure 12(b)(6).<sup>273</sup>

The court gave significant weight to the fair use defense’s first prong analyzing the purpose and character of the use, which in this case was a bona fide news report.<sup>274</sup> “[T]here can be no doubt that Bloomberg’s purpose in obtaining and disseminating the recording at issue was to make important financial information about Swatch Group available to investors and analysts. That kind of information is of critical importance to securities markets,” the court wrote.<sup>275</sup>

Bloomberg’s status as a news and data operation was entitled to First Amendment protections, the court wrote, also noting that even though the

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266. *Authors Guild, Inc.*, 954 F. Supp. 2d at 293; *see also* U.S. CONST. art. I, § 8, cl. 8.

267. *Authors Guild, Inc.*, 954 F. Supp. 2d at 293.

268. 756 F.3d 73, 77-79, 92 (2d Cir. 2014); 742 F.3d 17, 20-22, 35 (2d Cir. 2014). The Second Circuit issued virtually identical opinions on the same day, ruling on appeals of motions and cross motions.

269. *Swatch Grp. Mgmt. Servs.*, 756 F.3d at 78.

270. *Id.*

271. *Id.*

272. *Id.* at 78-79.

273. *Id.* at 80-92.

274. *Swatch Grp. Mgmt. Servs.*, 756 F.3d at 82.

275. *Id.*

company generates income from subscriptions and other fees that does not convert its status into a purely commercial venture.<sup>276</sup> Swatch Group's argument that Bloomberg operated in bad faith was also inconsequential, the court added.<sup>277</sup>

The court finally found Bloomberg's use was transformative, also worthy of protection under the fair use doctrine's first prong, which the court wrote: "In the context of news reporting and analogous activities, moreover, the need to convey information to the public accurately may in some instances make it desirable and consonant with copyright law for a defendant to faithfully reproduce an original work without alteration."<sup>278</sup>

The court's discussion on the other fair use prongs<sup>279</sup> largely proved academic. The court surmised:

Although Bloomberg copied the recordings without changing it, Bloomberg's use served the important public purpose of disseminating important financial information, without harm to the copyright interests of the author. Furthermore, although the recording remains technically unpublished under § 101, Swatch Group controlled the first dissemination of its executives' expression to the public, and Swatch's copyright is thin at best.<sup>280</sup>

### C. Digital Millennium Copyright Act

In *Wolk v. Photobucket.com*, the Second Circuit affirmed dismissal of a copyright infringement complaint, supporting the rationale applied by the district court.<sup>281</sup> The district court's decision largely rested on finding that the defendant, an internet-based enterprise that allows users to post digital photos and materials online, was entitled to the "safe harbor" protections under the Digital Millennium Copyright Act ("DMCA").<sup>282</sup> The plaintiff, an artist whose work appeared on the website and was used without consent by third parties, brought an injunction to block users and a complaint seeking damages for the unauthorized use and direct and indirect infringement of her digitized artwork.<sup>283</sup> Photobucket is a photo-sharing website that allows users to

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276. *Id.* at 83-84.

277. *Id.* at 83.

278. *Id.* at 84-85.

279. *Swatch Grp. Mgmt. Servs.*, 756 F.3d at 87-92.

280. *Id.* at 92.

281. 569 F. App'x 51, 52 (2d Cir. 2014).

282. *Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724, 730, 743 (S.D.N.Y. 2012); *see* 17 U.S.C. § 512(c) (2013).

283. *Wolk*, 840 F. Supp. 2d at 729.



post materials and upload photos, videos, and other visual content, to the tune of about nine billion images.<sup>284</sup>

The critical question was whether Photobucket had immunity under the DMCA's safe harbor provisions, which the court determined by applying three elements of the statute: 1) that the party "must be a 'service provider'"; 2) with a "reasonably implemented" policy for termination of "users who are repeat infringers"; and 3) that does "not interfere with standard technical measures used by copyright owners."<sup>285</sup> "Because Photobucket fulfills all the required provisions of the statute and because the DMCA does not require the active enforcement the Plaintiff has described, Photobucket is able to take advantage of the 'safe harbor' provision under 17 U.S.C. § 512(c)," the court wrote, concluding the website should not have any financial liability.<sup>286</sup>

#### D. Jurisdiction

A New York-based film company's copyright infringement suit against a German pay-per-view movie channel was properly dismissed for failing to properly establish personal jurisdiction in *Troma Entertainment, Inc. v. Centennial Pictures, Inc.*, the Second Circuit affirmed.<sup>287</sup> At issue was whether the standards of New York's long-arm statute were properly satisfied in this infringement case.<sup>288</sup> The plaintiff here produced and distributed such films as *Citizen Toxie*, *Toxic Avenger Part IV* and *Poultrygeist: Night of the Chicken Dead*.<sup>289</sup> The defendant broadcast these movies on its movie channel, purportedly without a license from the plaintiff.<sup>290</sup>

The most critical element of the case depended on whether Troma had established a prima facie case for infringement, which the court concluded was not established.<sup>291</sup> The court also applied the recent ruling certifying the standards for jurisdiction in web-based infringement disputes in *Penguin Group (USA), Inc. v. American Buddha*.<sup>292</sup> *Penguin* established that a plaintiff must prove an economic injury and residency

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284. *Id.* at 730.

285. *Id.* at 743 (citing *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1099 (W.D. Wash. 2004)).

286. *Id.* at 749.

287. 729 F.3d 215, 216-17 (2d Cir. 2013).

288. *Id.* at 217 (applying N.Y. C.P.L.R. § 302(a)(3) (McKinney 2014)).

289. *Id.* at 216.

290. *Id.* at 217.

291. *Id.* at 217, 221.

292. *Troma Entm't, Inc.*, 729 F.3d at 218-19 (citing *Penguin Grp. (USA), Inc. v. Am. Buddha*, 609 F.3d 30, 34 (2d Cir. 2010); *Penguin Grp. (USA), Inc. v. Am. Buddha*, 16 N.Y.3d 295, 301-02, 946 N.E.2d 159, 161-62, 921 N.Y.S.2d 171, 173-74 (2011)).

to bind an infringement claim to the jurisdiction.<sup>293</sup>

Here, the court ruled that Troma failed to establish a specific injury or the prima facie elements that the defendant engaged in any harmful infringement or any specific injury within the jurisdiction.<sup>294</sup>

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293. *See id.* at 218-20 (citing *Penguin Grp. (USA), Inc.*, 16 N.Y.3d at 304-06, 946 N.E.2d at 163-64, 921 N.Y.S.2d at 175-76).

294. *Id.* at 220-21.