

MEDIA LAW

Roy S. Gutterman[†]

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INTRODUCTION

This year’s media law *Survey* covers a range of tort and statutory challenges involving a broad range of media entities. Litigants posed diverse claims, many emanating from both colorful and high-profile facts. Parties included a diversity of media defendants from traditional journalists, to artistic photographers, to reality television producers. The colorful cast of litigants includes high-profile investors, socialites, models, hip-hop artists, Olympic medalists, and a college basketball coach, just to name a few. Many cases involved high-profile matters of public interest and highly publicized intellectual property challenges and

[†] Associate Professor and Director of the Tully Center for Free Speech at the S.I. Newhouse School of Public Communications at Syracuse University.

touch on important First Amendment values.

I. DEFAMATION

A. *Elements*

Statements and references to an investment manager depicted in the best-selling book, *The Big Short*, were not defamatory and were properly dismissed, the Second Circuit ruled in *Chau v. Michael Lewis*.¹ Plaintiff complained that twenty-six statements in the book about the housing investment collapse were defamatory. The court denied the action as a matter of law because some were protected opinion, substantially true, not factual, or not about plaintiff in the first place.²

The offending quotes included insulting or derogatory references to the plaintiff and numerous vague references to the plaintiff's role in questionable investments or other controversies in the housing market collapse.³ Applying New York substantive law, the court reiterated the five elements a plaintiff needs to prove for a viable defamation complaint: (1) a published factual statement about plaintiff; (2) to a third party; (3) with fault; (4) falsity; (5) and special damages or per se actionability.⁴ The court wrote:

Not all (or even most) maligning remarks can be considered defamatory. A statement is defamatory if it exposes an individual "to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or . . . induce[s] an evil opinion of one in the minds of right-thinking persons."⁵

Interpreting the nature of the language and its meaning falls under the court's purview as a matter of law and it is screened through the lens of an "ordinary person" determining "if that statement is 'reasonably susceptible to a defamatory connotation.'"⁶

Ruling on another basic element of the tort, the of and concerning prong, the court found that general references to collateralized debt organization managers or other statements about larger groups were not specifically about the plaintiff so as to warrant a defamation claim.⁷

1. 771 F. 3d 118, 122 (2d Cir. 2014).

2. *Id.* at 122.

3. *Id.* at 122–26.

4. *Id.* at 126–27.

5. *Id.* at 127 (quoting *Kimmerle v. N.Y. Evening Journal, Inc.*, 262 N.Y. 99, 102, 186 N.E. 217, 218 (1933)).

6. *Chau*, 771 F. 3d at 127. (quoting *James v. Gannett Co.*, 40 N.Y.2d 415, 419, 353 N.E.2d 834, 837, 386 N.Y.S.2d 871, 874 (1976)).

7. *Id.* at 129.

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Furthermore, some statements about the investment practices were either true or substantially true and “not susceptible to defamatory connotation.”⁸ Acknowledging that determining the truth of a statement is not always a clear, simple finding, the court reiterated the well-established standard that the statement in question “need not be completely true, but can be substantially true.”⁹

With regard to opinion, the court also applied long-standing elements to determine whether statements are protected opinion, which included an analysis of the language and the context in which the statements were published.¹⁰ Language about the plaintiff calling him a “sucker,” a “fool,” and “crooks or morons” among other things, may be derogatory but do not reach the level of defamatory.¹¹ The court wrote:

While someone may not appreciate being called a fool, it is an expression of one’s view of another, and moreover might not reflect reality: history has shown many “fools” to have indeed been visionaries. Time may prove the insult misguided, but the insult is not itself a fact—but rather, is one’s perception of facts—at the time it is uttered.¹²

A dismissal of a defamation claim was affirmed, but the case should have been dismissed as an example of mixed opinion rather than libel by implication, the Second Circuit held in *Sorvillo v. St. Francis Preparatory School*.¹³ The plaintiff, a fired former teacher at the school, argued that a letter sent by school officials criticizing her blog posts were defamatory.¹⁴ The court rejected the claim because libel by implication means a plaintiff can prove that a statement can harm reputation when “premised not on direct false statements but on false suggestions, impressions and implications arising from otherwise truthful statements.”¹⁵

Instead, the case should have been dismissed because the statements should have been viewed as “mixed opinion,” which means the statements were accompanied by “a recitation of the facts on which it is

8. *Id.* at 130.

9. *Id.* at 129.

10. *Id.* at 128–29.

11. *Chau*, 771 F. 3d at 129.

12. *Id.* at 129. Judge Winter dissented, arguing that some statements published in the book could easily have been determined to be defamatory had a jury been afforded the opportunity to assess the statements in a broader context. *Id.* at 132–36.

13. 607 Fed. App’x. 22, 24–25 (2d Cir. 2015).

14. *Id.* at 23. The district court’s memorandum and order provides a more thorough discussion of the facts of the case. See 13 CV 3357 (E.D. N.Y. August 12, 2014).

15. *Sorvillo*, 607 Fed. App’x at 23 (quoting *Armstrong v. Simon & Schuster, Inc.*, 85 N.Y.2d 373, 380–81, 649 N.E.2d 825, 829, 625 N.Y.S.2d 477, 481 (1995)).

based or one that does not imply the existence of undisclosed underlying facts.”¹⁶

A magazine article did not falsely impute unchastity of a woman, a long-standing category of libel, when it published that the woman threw parties in the 1960s for “wealthy ‘older guys looking for action,’” the appellate division affirmed in *Cassini v. Advance Publications, Inc.*¹⁷ The article in *Vanity Fair* profiled the wife of the world-famous designer Oleg Cassini throughout litigation surrounding his estate.¹⁸ “Given the overall context in which the statements were made, a reasonable reader would not conclude that plaintiff was a prostitute or otherwise unchaste,” the court wrote.¹⁹

A trial court ruled that a photo misidentifying a woman as a party to a sex scandal could satisfy the elements of defamation.²⁰ The plaintiff’s photo was erroneously included in a 2013 *People* magazine story about the devolution of the marriage of Google co-founder Sergey Brin, who was depicted as having an extramarital affair with an employee.²¹ The plaintiff bore a resemblance to the woman with whom Brin had an affair.²² *People* mistakenly published the plaintiff’s photo with an erroneous caption identifying her as the other woman, which the magazine later acknowledged as an error and published a correction in print and online.²³

There was no question whether a person can be defamed by being wrongly identified in a photograph.²⁴ “Courts more recently have held that in instances of misidentifying photographs when plaintiff is not the intended subject of a defamatory article, it is an issue of fact whether a reasonable reader would impute the content of the article to plaintiff,” the court wrote.²⁵

The court also had to weigh whether the photograph’s and article’s implications that the plaintiff played a role in an extramarital affair was

16. *Id.* at 24–25 (quoting *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 153, 623 N.E.2d 1163, 1168, 603 N.Y.S.2d 813, 818 (1993)).

17. 125 A.D. 3d 467, 468, 4 N.Y.S.3d 4, 5 (1st Dep’t 2015).

18. *Id.*

19. *Id.*

20. *De Clercq v. Time, Inc.*, No. 154674/2014, 2015 N.Y. Misc. LEXIS 1024, at 7 (Sup. Ct. N.Y. Cty. Mar. 30, 2015).

21. *Id.* at 1–2.

22. *See id.*

23. *Id.* at 2.

24. *See id.* at 6 (citing *De Sando v. N.Y. Herald Co.*, 88 A.D. 492, 495, 85 N.Y.S. 111, 113 (1st Dep’t 1903)).

25. *De Clercq*, No. 154674/2014, 2015 N.Y. Misc. LEXIS 1024, at 7.

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susceptible of defamatory meaning.²⁶ Falsely imputing unchastity of a woman is a long-standing category of libel per se.²⁷

Though “[c]hanging social mores may affect how certain sexual conduct is viewed by the community so that what was defamatory per se at one time may no longer be the case,” the court also noted that such false statements could still be defamatory, and the plaintiff need not prove special damages.²⁸

The court held, “[t]he juxtaposition of De Clercq’s photograph along with the commentary describing her as Rosenberg, the alleged paramour of a married man causing a marriage to break up, arguably exposes De Clercq to public contempt for unchaste behavior.”²⁹

The court denied the defendant’s motion to dismiss the libel claims under CPLR 3211(a)(7).³⁰ However, the court dismissed the plaintiff’s privacy claims under New York Civil Rights Law sections 50-51 because the photographs were part of news coverage, albeit tabloid gossip, of a matter of public interest remiss of any trade, commercial, or advertising use.³¹

Critical comments alleging that officers of a New York real estate company and a disgruntled client almost reached a physical altercation as well as other statements could be subject of defamatory import, a trial court ruled.³² Though this case does not necessarily involve media defendants, it shows how statements alleging “unethical, unscrupulous, borderline illegal tactics to force our longtime residents,” on social media and online communications can create liability for defamation.³³

The court dismissed the defendants’ motion to dismiss, finding the statements met the prima facie elements of defamation and could not be read as protected opinion.³⁴ “The contention that plaintiff’s reputation is not harmed by these statements is nonsensical,” the court wrote, adding that the “ordinary meaning” of the language could be read as

26. *Id.* at 3–4.

27. *Id.* at 3 (citing *James v. Gannett Co., Inc.*, 40 N.Y.2d 415, 419, 353 N.E.2d 834, 837, 386 N.Y.S.2d 871, 874 (1976)).

28. *Id.* at 4, 8.

29. *Id.* at 5.

30. *De Clercq*, No. 154674/2014, 2015 N.Y. Misc. LEXIS 1024, at 7.

31. *Id.* at 8–9 (“It is well settled that a picture illustrating an article on a matter of public interest is not considered used for the purpose of trade or advertising unless it has no real relationship to the article or unless the article is an advertisement in disguise”).

32. *My Space N.Y.C. Corp. v. Crown Heights Assembly*, No. 500762/2013, 2014 N.Y. Misc. LEXIS 3789, at 2, 4 (Sup. Ct. Kings Cty. Aug. 15, 2014).

33. *Id.* at 2, 15.

34. *Id.* at 16.

defamatory.³⁵

B. Public Figure/Private Figure/Actual Malice

A former Olympic gold medal figure skater was a public figure who was unable to prove that statements about her were false and published with actual malice, the Second Circuit affirmed in *Baiul v. Disson*.³⁶ Because of the plaintiff's international fame, the court had "little trouble" holding her to the actual malice standard under *New York Times v. Sullivan* and *Gertz v. Robert Welch*.³⁷

Thus, a public figure must prove that the offending publication was made with actual malice, either known falsity or reckless disregard for the truth, which the plaintiff failed to do here.³⁸

The court wrote:

With respect to Disson's allegedly false statements regarding his public disclosure and advertising of Baiul's appearance, as well as his description of her withdrawal from the relevant skating shows, Baiul has provided no evidence that Disson made these statements with actual malice. . . .³⁹

To the extent this statement is false, Baiul provides no evidence that Disson made it with knowledge of its falsity or reckless disregard of the truth. She does not cast doubt on Boitano's reliability as a source, nor does she suggest the improbability of the story.⁴⁰

Websites that republished a controversial magazine profile that alleged the plaintiff was an art forger were protected because earlier claims were also dismissed in *Biro v. Conde Nast*.⁴¹ As a limited purpose public figure, the plaintiff was unable to prove that the websites published the allegations with actual malice under *New York Times v. Sullivan*.⁴²

35. *Id.*

36. 607 Fed. App'x 18, 19–20 (2d Cir. 2015).

37. *Id.* at 20 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)).

38. *Id.* (quoting *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 123 (2d Cir. 2013)).

39. *Id.* at 21.

40. *Id.*

41. No. 11–CV–4442 (JPO), 2014 U.S. Dist. Lexis 139065, at 3–4 (S.D.N.Y. Sept. 29, 2014). *See also* *Biro v. Conde*, 963 F. Supp. 2d 255, 259–260 (S.D.N.Y. 2013); *Biro v. Conde*, 883 F. Supp. 2d 441, 453 (S.D.N.Y. 2012). The Second Circuit affirmed in a decision that fell outside the *Survey* dates. *See* *Biro v. Conde*, 807 F. 3d 541, 542 (2d Cir. 2015).

42. *Id.* at 4–5 (citing *N.Y. Times*, 376 U.S. at 279–80).

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C. Truth Defense

A hip-hop music manager's libel claim against a television network's online sound slide package linking him to the shooting of rapper Curtis "50 Cent" Jackson was not actionable, a trial court ruled.⁴³ The plaintiff was called "infamous" and his 1970s bank robbery convictions were also referenced in the online package about "Infamous Music Managers."⁴⁴

50 Cent, the plaintiff's former client, survived a highly-publicized shooting, which became the subject of both lore and music.⁴⁵ The plaintiff had been implicated in both interviews and 50 Cent's rap songs, and it appears that the plaintiff never fully disputed a role in the shooting.⁴⁶ Because both previous journalistic and musical coverage of the underlying shooting were never disputed, the defendant was entitled to posit a truth defense.⁴⁷

"It is well settled that truth is an absolute defense to a defamation cause of action, regardless of the harm done by the alleged defamatory statements," the court wrote, adding that the standard is "substantially true."⁴⁸ The court also noted that describing the plaintiff as "infamous" was too subjective to attach liability.⁴⁹

Most critically, the court wrote:

Given that plaintiff does not outright deny that 50 Cent had accused him of involvement in the shooting, the well-reported conflict between plaintiff and 50 Cent over such alleged involvement, and plaintiff's promotion of such conflict on Black Hand Entertainment's website, it is disingenuous for plaintiff to argue that the statement '50 Cent accused him of playing a role in the infamous 200 shooting' is false, regardless of whether the accusation itself is true.⁵⁰

D. Opinion

The Court of Appeals ruled that a basketball coach's comments at a press conference imputing that two men had lied about allegations of child abuse was susceptible of a defamatory meaning in *Davis v.*

43. *Williams v. Black Entm't Television Networks*, No. 13800/2014, 2015 N.Y. Misc. LEXIS 2700, at 1–2 (Sup. Ct. Queens Cty. May 6, 2015).

44. *Id.* at 1.

45. *Id.* at 2.

46. *Id.* at 3–4.

47. *Id.* at 4.

48. *Williams*, No. 13800/2014, 2015 N.Y. Misc. LEXIS, at 3.

49. *Id.* at 3–4 (the plaintiff also did not seek damages for the truthful account of his previous criminal activities).

50. *Id.* at 4.

Boeheim.⁵¹

At issue here were allegations made by the plaintiffs who claimed they were molested by an assistant basketball coach who was on the defendant's staff for more than twenty years.⁵² In response to allegations and a subsequent investigation, the defendant made a number of statements calling the plaintiff's allegations into question, most notably:

It's a bunch of a thousand lies that [Davis] has told He supplied four names to the university that would corroborate his story. None of them did . . . there is only one side to this story. He is lying I believe they saw what happened at Penn State, and they are using ESPN to get money. That is what I believe.⁵³

The case reached the high court following a pre-answer motion under CPLR 3211(a)(7) which was affirmed by the appellate division in a three to two decision.⁵⁴ Determining whether a statement is factual or opinion is a matter of law.⁵⁵

After reviewing the blackletter law of defamation, a false statement of fact that exposes a person to "public contempt, hatred, ridicule, aversion or disgrace,"⁵⁶ the court focused on whether the opinion privilege indemnified the statements at issue.⁵⁷ Applying long-standing precedent on pure opinion, the court wrote, "[a] defamatory statement of fact is in contrast to 'pure opinion' which under our laws is not actionable because '[e]xpressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation.'" ⁵⁸

The court also addressed the concept of "mixed opinion," which would be actionable because it "implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it."⁵⁹

51. 24 N.Y.3d 262, 265, 22 N.E.3d 999, 1001, 998 N.Y.S.2d 131, 133 (2014).

52. *Id.*

53. *Id.* at 271, 22 N.E.3d at 1006, 998 N.Y.S.2d at 138.

54. *Id.* at 267, 22 N.E.3d at 1003, 998 N.Y.S.2d at 135. *See also* *Davis v. Boeheim*, 110 A.D.3d 1431, 1433, 972 N.Y.S.2d 385, 388 (4th Dep't 2013) (citing *Mann v. Abel*, 10 N.Y.3d 271, 276, 885 N.E.2d 884, 886, 856 N.Y.S.2d 31, 33 (2008) (dismissing the plaintiffs' defamation claims as a matter of law because within the context a reasonable reader could construe the statements as opinion not provable facts).

55. *Davis*, 24 N.Y.3d at 269, 22 N.E.3d at 1004, 998 N.Y.S.2d at 136 (citing *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 290, 501 N.E.2d 550, 553, 508 N.Y.S.2d 901, 904 (1986)).

56. *Id.* at 268, 22 N.E.3d at 1004, 998 N.Y.S.2d at 136 (quoting *Thomas H. v. Paul B.*, 18 N.Y.3d 580, 584, 965 N.E.2d 939, 942, 942 N.Y.S.2d 437, 440 (2012)).

57. *Id.* at 269, 22 N.E.3d at 1004, 998 N.Y.S.2d at 136.

58. *Id.* (alteration in original) (quoting *Mann v. Abel*, 10 N.Y.3d 271, 276, 885 N.E.2d 884, 885–86, 856 N.Y.S.2d 31, 32–33 (2008)).

59. *Davis*, 24 N.Y.3d at 268, 22 N.E.3d at 1004, 998 N.Y.S.2d at 136 (quoting

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Specifically, the court wrote, “[w]hat differentiates an actionable mixed opinion from a privileged, pure opinion is ‘the implication that the speaker knows certain facts, unknown to [the] audience, which support [the speaker’s] opinion and are detrimental to the person’ being discussed.”⁶⁰

Mechanically, the court applied a three-prong test: (1) Does the language at issue have a readily-understood precise meaning? (2) Are the statements capable of being proven true or false? And, (3) Does the full context of the communication and the surrounding circumstances signal to readers or listeners that the statement is opinion, not fact?⁶¹ The court wrote:

Applying the aforementioned principles to this case, the first and second factors weigh in favor of finding that Boenheim’s statements were factual assertions. With respect to the first factor, Boenheim used specific, easily understood language to communicate that Davis and Lang lied, their motive was financial gain, and Davis had made prior similar statements for the same reason. These are clear statements of the plaintiffs’ actions and the driving force for their allegations against Fine. Consideration of the second factor similarly weighs in favor of treating Boenheim’s statements as factual because the statements are capable of being proven true or false, as they concern whether plaintiffs made false sexual abuse allegations against Fine in order to get money, and whether Davis had made false statements in the past.⁶²

Further contextual factors take into consideration the speaker’s authority, stature, and role in the community, which would afford a greater degree of credibility to his statements.⁶³

The appellate division affirmed dismissal of a teacher’s libel claim against a newspaper that published a story accusing him of racism in *Silverman v. Daily News*.⁶⁴ In the story, the newspaper included excerpts of the plaintiff’s allegedly racist writings and other details, which the court held constituted protected opinion.⁶⁵ The court applied the following three-prong analysis: (1) whether the language has a precise meaning; (2) whether the language is capable of being proven true or

Steinhilber, 68 N.Y.2d at 289, 501 N.E.2d at 552–53, 508 N.Y.S.2d at 904 (1986)).

60. *Id.* (alteration in original) (quoting *Steinhilber*, 68 N.Y.2d at 290, 501 N.E.2d at 553, 508 N.Y.S.2d at 904).

61. *Id.* at 270, 22 N.E.3d at 1005, 998 N.Y.S.2d at 137 (quoting *Mann*, 10 N.Y.3d at 276, 885 N.E.2d at 886, 856 N.Y.S.2d at 33).

62. *Id.* at 271, 22 N.E.3d at 1006, 998 N.Y.S.2d at 138.

63. *Id.* at 273, 22 N.E.3d at 1007, 998 N.Y.S.2d at 139.

64. 129 A.D.3d 1054, 1054–55, 11 N.Y.S.3d 674, 675–76 (2d Dep’t 2015).

65. *Id.* at 1055, 11 N.Y.S.3d at 675.

false; and (3) whether within the context a reader would recognize the language to be opinion.⁶⁶

The court held:

[A] reasonable reader would have concluded that he or she was reading opinions, and not facts, about the plaintiff. Moreover, in all instances, the Daily News defendants made the statements with express reference to the written materials authored by the plaintiff, including quotations from the books. Thus, the statements of opinion are nonactionable on the additional basis that there was full disclosure of the facts supporting the opinions.⁶⁷

E. Privilege

In *Front, Inc. v. Khalil*, the Court of Appeals reaffirmed an ancient doctrine that lawyers' letters are privileged.⁶⁸ Though this case did not involve media entities, the issue of privilege reaffirmed by the court is of vital importance to media defendants facing litigation or assessing their liabilities. This controversy involved a critical letter sent to a third party in an employment and contract dispute.⁶⁹ Attaching privilege to lawyers' letters in connection to litigation dates back to an 1897 decision, the court wrote.⁷⁰

The critical holding was:

To ensure that such communications are afforded sufficient protection the privilege should be qualified. Rather than applying the general malice standard to this pre-litigation stage, the privilege should only be applied to statements pertinent to a good faith anticipated litigation. This requirement ensures that privilege does not protect attorneys who are seeking to bully, harass, or intimidate their client's adversaries by threatening baseless litigation or by asserting wholly unmeritorious claims, unsupported in law and fact, in violation of counsel's ethical obligations.⁷¹

Similarly, the appellate division held in *McPhillips v. New York* that statements made in legal papers and documents as part of litigation are absolutely privileged.⁷² Though no media entity was a party to the litigation here, the court reaffirmed the privilege associated with

66. *Id.* at 1055, 11 N.Y.S.3d at 676.

67. *Id.*

68. 24 N.Y.3d 713, 715, 28 N.E.3d 15, 16, 4 N.Y.S.3d 581, 582 (2015).

69. *Id.* at 716, 28 N.E.3d at 17, 4 N.Y.S.3d at 583.

70. *Id.* at 718, 28 N.E.3d at 18, 4 N.Y.S.3d at 584 (citing *Youmans v. Smith*, 153 N.Y. 214, 222, 47 N.E. 265, 267 (1897)).

71. *Id.* at 719–20, 28 N.E.3d at 19, 4 N.Y.S.3d at 585.

72. 129 A.D.3d 1360, 1361, 11 N.Y.S.3d 740, 742 (3d Dep't 2015).

documents, which may be drawn upon with immunity by members of the media.

F. Online Immunity CDA Section 230

For the first time, the Second Circuit ruled on a website's immunity from a defamation action based on the Communications Decency Act of 1996 (CDA), specifically section 230 in *Ricci v. Teamsters Union Local 456*.⁷³ The case emanated from a long-standing labor dispute between a couple and the teamsters union, which included allegedly defamatory statements published in a union's online newsletter.⁷⁴ In addition to causes of action against the union based on National Labor Relations Act issues, the plaintiffs sought to hold the newsletter's Internet-based host, GoDaddy, liable for damaging statements contained in the newsletter.⁷⁵

GoDaddy, as the newsletter's Internet host, played no role in the content and averred it had immunity under the CDA.⁷⁶ The plaintiffs acknowledged that GoDaddy asserted no editorial control or input over the newsletter, but put forth their claims because they had asked the host to remove the newsletter.⁷⁷

Since section 230 has been in effect, courts have wrestled with what types of websites or "interactive computer service[s]" should be afforded immunity as distributors rather than publishers under the law.⁷⁸ "In short, a plaintiff defamed on the [I]nternet can sue the original speaker, but typically 'cannot sue the messenger,'" the court wrote.⁷⁹

Section 230 provides a range of tort immunity, specifically defamation, for "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."⁸⁰ This immunity has been "construed broadly" to provide protection for the emerging technology which facilitates a similarly broad range of "freedom of speech."⁸¹

Though the Second Circuit had not previously ruled on section 230 immunity, the court follows the "consensus" set by similar rulings in

73. 781 F.3d 25, 26 (2d Cir. 2015).

74. *Id.*

75. *Id.*

76. *Id.* at 27.

77. *Id.*

78. *See Ricci*, 781 F.3d. at 27 (discussing 47 U.S.C. § 230(c)(1), (e)(3) (2012)).

79. *Id.* at 28 (quoting *Chi. Lawyers' Comm. for Civil Rights Under Law v. Craigslist, Inc.*, 519 F.3d 666, 672 (7th Cir. 2008)).

80. *Id.* at 27–28 (quoting 47 U.S.C. § 230(f)(2) (2012)).

81. *Id.* at 28 (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997)).

other circuits.⁸² The court held: “[t]hese allegations do not withstand the Communications Decency Act, which shields GoDaddy from publisher liability (with respect to web content provided by others) in its capacity as a provider of an interactive computer service.”⁸³

G. Miscellaneous

1. Procedural—Statute of Limitations

News coverage of a lawsuit about a bitter relationship breakup that was fought out over social media was privileged based on both the statute of limitation and the “fair and true” coverage of judicial proceedings, a state supreme court ruled.⁸⁴ In 2012, the plaintiff had been a defendant in a harassment lawsuit by his former partner, which then became the subject of news stories by the *Associated Press*, *The New York Post*, *Forbes*, and *The Daily Beast*.⁸⁵ In 2013, the plaintiff brought a pro se complaint based on defamation.⁸⁶

Because the action was filed more than a year after the publications, under CPLR 215(3), the court dismissed the plaintiff’s suit.⁸⁷ Three of the four articles were published outside the one-year statute of limitations, and the court noted, “[t]he cause of action accrues at the time of publication of the alleged defamatory statement.”⁸⁸

For the one article that was published within the one-year statute of limitations, the court ruled that because the stories were based on contents of the underlying civil action between the plaintiff and the underlying defendant, they were privileged.⁸⁹ New York Civil Rights Law section 74 attaches absolute privilege to “fair and true” reports of judicial proceedings and court documents.⁹⁰ The allegedly defamatory statements published in press accounts “were directly made in the course of judicial proceedings” and thus privileged.⁹¹

A lawyer’s defamation complaint against someone who posted

82. *Id.*

83. *Ricci*, 781 F.3d at 28.

84. *Moss v. Associated Press*, No. 158705/2013, 2014 N.Y. Slip Op. 31546(U), at 5–6 (Sup. Ct. N.Y. Cty. 2014).

85. *Id.* at 1–2.

86. *Id.* at 3. The plaintiff also amended his complaint to name the former partner as a defendant for intentional infliction of emotional distress and tortious interference with contract. *Id.*

87. *Id.* at 5 (citing N.Y. C.P.L.R. 215(3) (McKinney 2003)).

88. *Moss*, No. 158705/2013, 2014 N.Y. Slip Op. 31546(U), at 5.

89. *Id.* at 6.

90. *Id.* at 6–7.

91. *Id.* at 8.

critical comments about him on Craigslist was untimely under the one-year statute of limitations.⁹² Though the case did not involve any media defendants, it is worth exploring because of the difficulties libel cases pose to Internet-based entities and because Craigslist was dragged into court to identify the critics.⁹³ Craigslist revealed the IP address for the defendant following an order to show cause.⁹⁴ Even though the plaintiff was eventually able to identify the person who posted critical comments, the claims were ultimately barred because he brought his lawsuit after the statute of limitations.⁹⁵ Much like traditional publication, the one-year statute of limitations begins to run the date of the initial posting online.⁹⁶

2. Defamation—Anti-SLAPP

A flyer criticizing public officials for their role in a land deal dealt triggered defendants in a defamation lawsuit to invoke the state's anti-SLAPP statute, which protects critics of public policy, the appellate division affirmed in *Southampton Day Camp Realty v. Gorman*.⁹⁷

New York Civil Rights Law sections 70-a and 76-a provide both protection and legal fees for defendants in defamation cases.⁹⁸ Procedurally, the anti-SLAPP⁹⁹ statute is also linked to a defendant's motion to dismiss under CPLR 3211(a)(7) for failure to state a claim.¹⁰⁰

The court wrote, “[h]ere, the defendants established, prima facie, that the plaintiffs were public applicants and that the suit concerned a communication that was ‘materially related’ to the defendants’ efforts to report on, comment on, or oppose the plaintiffs’ application.”¹⁰¹

3. Defamation—Procedural/Service/Internet Identification

A law firm was denied permission to serve its defamation complaint on three websites where anonymous posters had publicly criticized it.¹⁰² After being unable to ascertain the identity of the source of posted negative comments about the law firm on the websites, Ripoff Report,

92. *Katzman v. Does*, No. 702315, 2015 Slip Op. 50045(U), at 1 (Sup. Ct. Queens Cty. 2015).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. 118 A.D.3d 976, 976, 990 N.Y.S.2d 30, 31 (2d Dep’t 2014).

98. N.Y. CIV. RIGHTS LAW §§ 70–a, 76–a (McKinney 2015).

99. SLAPP stands for strategic lawsuit against public participation.

100. *Southampton*, 118 A.D.3d at 977–78, 990 N.Y.S.2d at 32.

101. *Id.* at 978, 990 N.Y.S.2d at 32.

102. *MLO v. “Younglawyer”*, No. 506175/2014, 2015 N.Y. Slip Op. 30498(U), at 2 (Sup. Ct. Kings Cty. 2015).

Liars and CheatersRUs and Complaints Board, the plaintiffs employed a novel approach to file their complaints on the websites as “rebuttals.”¹⁰³

The plaintiffs invoked CPLR 308(5) which afforded the plaintiffs the opportunity to employ non-traditional methods of service upon motion to the court.¹⁰⁴ The court doubted whether this would be an effective method, especially considering the anonymous nature of the underlying allegations.¹⁰⁵

A dentist’s motion to unmask the identity of an anonymous poster on the complaint-based website, Yelp!, was granted by a state trial court.¹⁰⁶ This pre-action procedural mechanism allowed the plaintiff to seek a court order to compel a computer service or website to reveal the IP address and identity of a potential defendant to a defamation claim as long as the plaintiff established a prima facie case.¹⁰⁷ The respondent in this case was CSC Holdings, Inc., the operating company for Cablevision, who was identified as the computer service provider of the allegedly defamatory statements about the plaintiff, whose work as a dentist was impugned by an anonymous poster on Yelp!.¹⁰⁸

The published statements met the basic elements of defamation as a false factual statement about the plaintiff that could harm his reputation.¹⁰⁹ “The real question in the presence of the burgeoning use of electronic speech requires a balancing of the two interests, namely free expression versus the right to respond to such expression. Free speech in the electronic age is not unfettered,” the court wrote.¹¹⁰ Thus Cablevision was ordered to turn over the information.¹¹¹

4. Miscellaneous Newsgathering

A trial court rejected a request for an injunction to bar a critic from speaking to third parties, including news reporters.¹¹² This case emanated from a business dispute surrounding a senior care facility for Chinese

103. *Id.*

104. *Id.*

105. *Id.* at 3.

106. *Cohen v. CSC Holdings, L.L.C.-Cablevision*, No. 603037/15, 2015 N.Y. Slip Op. 32005(U), at 2, 4 (Sup. Ct. Nassau Cty. 2015).

107. *Id.* at 2 (applying C.P.L.R. 3102(c) (McKinney 2011)).

108. *Id.*

109. *Id.* at 3. The statement at issue alleged the dentist “drilled out a tiny piece” of the poster’s tongue and caused an infection. *Id.* at 4.

110. *Cohen*, No. 603037/15, 2015 N.Y. Slip Op. 32005(U), at 4–5.

111. *Id.* at 5.

112. *Wang v. Wong*, No. 5593/2014, 2014 N.Y. Slip Op. 51341(U), at 8 (N.Y. Sup. Ct. 2014).

immigrants and was fought out publicly in the local ethnic press.¹¹³ Courts are skeptical about injunctions that accompany defamation cases or potential defamation cases, especially when factoring in First Amendment concerns.¹¹⁴

The defamation complaint, based on statements made to reporters at press conferences, did not implicate any media defendants and was the subject of a second opinion, dismissing some counts but allowing three counts to go forward.¹¹⁵ The court reiterated the requirements for a defamation complaint under CPLR 3016(a), which requires “the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally.”¹¹⁶

II. INVASION OF PRIVACY

New York’s conception of invasion of privacy continued to vex prospective plaintiffs and push the boundaries of technology and art.

New York’s statutory provisions for invasion of privacy under New York Civil Rights Laws sections 50–51 provide a cause of action for unauthorized use of a person’s “name, portrait or picture . . . or voice” for commercial, advertising, or trade purposes.¹¹⁷ This law was passed after a seminal invasion of privacy decision in 1902 failed to provide relief for a girl whose portrait was used without her consent to market flour.¹¹⁸ More than a century later, New York courts have narrowly interpreted the statute to apply solely to pure commercial ventures while affording broad protections to a wide range of newsworthy or artistic endeavors that are matters of public interest.¹¹⁹

In *Foster v. Svenson*, the appellate division affirmed dismissal of an invasion of privacy suit against a noted art photographer who had used a high-powered camera lens to surreptitiously photograph his neighbors, unbeknownst to them, and mostly children.¹²⁰ Many of the children were photographed in various stages of nudity, some in bathing suits, for the defendant’s art photography exhibit titled, “The Neighbors.”¹²¹ The photo

113. *Id.* at 1–4.

114. *Id.* at 7.

115. *See Wang*, No. 5593/2014, 2014 N.Y. Slip Op. 51341(U), at 5–7.

116. *Id.* at 4–5 (quoting N.Y. C.P.L.R. 3016(a) (McKinney 2015)).

117. N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2015).

118. *See Roberson v. Rochester Folding Box, Co.*, 171 N.Y. 538, 542, 64 N.E. 442, 442 (1902).

119. *See Nussenzweig v. diCorcia*, 38 A.D.3d 339, 346–47, 832 N.Y.S.2d 510, 516–17 (1st Dep’t 2007).

120. 128 A.D.3d 150, 152, 7 N.Y.S.3d 96, 98 (1st Dep’t 2015).

121. *Id.* at 153, 7 N.Y.S.3d at 98–99.

exhibit appeared in galleries as well as online with the photographs available for sale.¹²²

The plaintiffs were unaware that the defendant, their neighbor, had been photographing them and their children and they never consented to the exhibit, nor were they offered compensation or a share of the profits.¹²³ The plaintiffs argued that the sale of the photographs constituted a commercial use, which would afford them a statutory cause of action.¹²⁴ Reiterating the long-standing interpretation of the statute, both the lower court and the appellate division narrowly interpreted the meaning of commercial, advertising, and trade usage.¹²⁵

The court wrote:

The legislature's . . . broad, unqualified terms for advertising and trade purposes, on their face, appear to support plaintiffs' contention that the statutory terms apply to all items which are bought and sold in commerce. Courts, however, have refused to adopt a literal construction of these terms because the advertising and trade limitations of the privacy statute were drafted with the First Amendment in mind.¹²⁶

The court delved deeper into the exceptions to the statute based on the newsworthiness exception, which occasionally touches on entertainment media and would definitely incorporate artwork, including the material at issue in this case.¹²⁷ Specifically, the court wrote, "[s]ince the newsworthy and public concern exemption has been applied to many types of artistic expressions, including literature, movies and theater, it

122. *Id.*

123. *Id.*

124. *Id.* at 155, 7 N.Y.S.3d at 100. The plaintiffs' lawsuit also included causes of action for intentional infliction of emotional distress based on the outrageousness of the materials and the means of collection. This claim was similarly dismissed under much of the same rationale as the privacy claims. *Foster*, 128 A.D.3d at 161–62, 7 N.Y.S.3d at 104–05.

125. *Foster*, 128 A.D.3d at 159–61, 7 N.Y.S.3d at 102–04 (citing *Beverley v. Choices Women's Med. Ctr., Inc.*, 78 N.Y.2d 745, 751–53, 579 N.Y.S.2d 637, 640–41, 587 N.E.2d 275, 278–79 (1991); *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 974, 638 N.E.2d 511, 513 (1994); *Nonnon v. N.Y.C.*, 9 N.Y.3d 825, 827, 842 N.Y.S.2d 756, 758, 874 N.E.2d 720, 722 (2007); *Stephano v. News Grp. Publ'ns., Inc.*, 64 N.Y.2d 174, 185, 485 N.Y.S.2d 220, 225–26, 474 N.E.2d 580, 585–86 (1984)).

126. *Id.* at 155–56, 7 N.Y.S.3d at 100.

127. *Id.* at 156, 7 N.Y.S.3d at 100–01 (citing *Stephano*, 64 N.Y.2d at 184, 485 N.Y.S.2d at 224–25, 474 N.E.2d at 584–85; *Arrington v. N.Y. Times Co.*, 55 N.Y.2d 433, 440, 449 N.Y.S.2d 941, 944, 434 N.E.2d 1319, 1322 (1982); *Finger v. Omni Publ'ns Int'l, Ltd.*, 77 N.Y.2d 138, 141–42, 564 N.Y.S.2d 1014, 1016, 566 N.E.2d 141, 143 (1990); *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 140–41, 490 N.Y.S.2d 735, 739–40, 480 N.E.2d 349, 353–54 (1985); *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 357–61, 107 N.E.2d 485, 487–89 (1952); *Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 123, 596 N.Y.S.2d 350, 354, 612 N.E.2d 699, 703 (1993); *Univ. of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 22 A.D.2d 452, 456, 256 N.Y.S.2d 301, 305 (1st Dep't 1965)).

logically follows that it should also be applied equally to other modes of artistic expression. Indeed, works of art also convey ideas.”¹²⁸

The defendant’s artwork and methods of gathering his material were not without criticism, though, as the court called them “disturbing” and “intrusive,”¹²⁹ while also highlighting “the limitations” of New York’s law.¹³⁰ The court added, “[n]eedless to say, as illustrated by the troubling facts here, in these times of heightened threats to privacy posed by new and ever more invasive technologies, we call upon the legislature to revisit this important issue, as we are constrained to apply the law as it exists.”¹³¹

A convicted murderer’s invasion of privacy claims against producers of a film based on his high-profile case were dismissed by a trial court.¹³² The plaintiff had been convicted of murdering his father and attempting to murder his mother in a case that drew widespread media attention before the defendants produced a Lifetime movie based on the case.¹³³ Invoking New York’s invasion of privacy statute, the plaintiff first sought to block the film with an injunction, that was ultimately dismissed, and also sought damages, arguing the film used his name and image for trade purposes.¹³⁴

In dismissing the claim, the court characterized some of the plaintiff’s allegations as “perfunctory” and improper because “the movie falls squarely within the newsworthiness exception” to the statute.¹³⁵ The court also noted that the film took some artistic liberties employing fictionalizations, further removing the facts from the plaintiff’s purview.¹³⁶

128. *Id.* at 156–57, 7 N.Y.S.3d at 101.

129. *Id.* at 163, 7 N.Y.S.3d at 105 (citing N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2009)).

130. *Foster*, 128 A.D.3d at 152, 7 N.Y.S.3d at 98.

131. *Id.* at 163, 7 N.Y.S.3d at 106.

132. *Porco v. Lifetime Entm’t Servs., L.L.C.*, 48 Misc. 3d 419, 420, 422–23, 9 N.Y.S.3d 567, 568, 570–71 (Sup. Ct. Clinton Cty. 2015).

133. *Id.* at 420, 422, 9 N.Y.S.3d at 568, 570 (citing N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2009)).

134. *Id.* at 420, 423, 9 N.Y.S.3d at 568–69, 571 (citing N.Y. CIV. RIGHTS LAW §§ 50, 51); *see also Porco v. Lifetime Entm’t Servs., L.L.C.*, 116 A.D.3d 1264, 1265, 984 N.Y.S.2d 457, 458 (3d Dep’t 2014) (citing N.Y. CIV. RIGHTS LAW §§ 50, 51).

135. *Porco*, 48 Misc. 3d at 422, 9 N.Y.S.3d at 570.

136. *Id.*

III. OTHER TORTS

Claims for tortious interference and defamation by a plastic surgeon who appeared on a reality television show were properly dismissed, the appellate division affirmed in *Klapper v. Graziano*.¹³⁷ After his appearance in the reality television show *Mob Wives*, the plaintiff objected to his depiction and brought his unsuccessful lawsuit against a raft of defendants associated with the show's production, broadcast, and distribution.¹³⁸

The court barely scratched the surface on the substantive law of tortious interference with business relationships, arguing that the complaint failed to identify a third party whose business dealings were harmed by the show's broadcast.¹³⁹ Instead, the court, much like the trial court below, focused on the appearance release the plaintiff signed.¹⁴⁰

The court wrote:

Contrary to the plaintiff's contention, the [terms of the] appearance release he signed in January 2011 bar[] his remaining causes of action against the defendant Left/Right, Inc., and the other corporate defendants. Such releases, which are commonly used in the entertainment industry, are enforceable and should not lightly be set aside. The allegations against the corporate defendants are insufficient to demonstrate willful or grossly negligent acts or intentional misconduct which would render the appearance release unenforceable.¹⁴¹

137. 129 A.D.3d 674, 674–75, 10 N.Y.S.3d 560, 561–62 (2d Dep't 2015) (citing N.Y. C.P.L.R. 3211(a)(1), (5), (7) (McKinney 2005)).

138. *Id.*

139. *Id.* at 675, 10 N.Y.S.3d at 562 (citing *White Plains Coat & Apron Co. v. Cintas Corp.*, 8 N.Y.3d 422, 426, 835 N.Y.S.2d 530, 532, 867 N.E.2d 381, 383 (2007); *Parekh v. Cain*, 96 A.D.3d 812, 816, 948 N.Y.S.2d 72, 76 (2d Dep't 2012)).

140. *Id.* at 674–76, 10 N.Y.S.3d at 562–63 (citing N.Y. C.P.L.R. 3211(a)(1), (5), (7); *Givati v. Air Techniques, Inc.*, 104 A.D.3d 644, 645, 960 N.Y.S.2d 196, 198 (2d Dep't 2013); *Kass v. Kass*, 91 N.Y.2d 554, 567, 673 N.Y.S.2d 350, 357, 696 N.E.2d 174, 181 (1998); *Solco Plumbing Supply, Inc. v. Hart*, 123 A.D.3d 798, 800, 999 N.Y.S.2d 126, 128 (2d Dep't 2014); *Abacus Fed. Sav. Bank v. ADT Sec. Servs., Inc.*, 18 N.Y.3d 675, 683, 944 N.Y.S.2d 443, 446, 967 N.E.2d 666, 669 (2012); *Kalisch-Jarcho, Inc. v. N.Y.C.*, 58 N.Y.2d 377, 385, 461 N.Y.S.2d 746, 750, 448 N.E.2d 413, 416–17 (1983)).

141. *Id.* at 675–76, 10 N.Y.S.3d at 562 (citing *Abacus Fed. Sav. Bank*, 18 N.Y.3d at 683, 944 N.Y.S.2d at 446, 967 N.E.2d at 669; *Kalisch-Jarcho, Inc.*, 58 N.Y.2d at 385, 461 N.Y.S.2d at 750, 448 N.E.2d at 416–17).

IV. INTELLECTUAL PROPERTY

A. Copyright—General

A district court may have had the last word on the more than two-year-old litigation involving an online television retransmission service in *American Broadcasting Co., Inc. v. Aereo, Inc.*¹⁴² Ruling on post-judgment remand, following a noted 2014 decision by the United States Supreme Court, the district court ruled that the defendant's, Aereo's, service essentially should be shut down.¹⁴³

Specifically, this decision centered on a preliminary injunction seeking to prevent Aereo from transmitting the plaintiff's television broadcasts via Aereo's micro antenna, digitization, and distribution mechanisms.¹⁴⁴ Aereo attempted to navigate through the Supreme Court's unfavorable decision, which the district court unequivocally rejected.¹⁴⁵

The district court enforced the Supreme Court's decision on issues of retransmission, public performance of copyrighted works, and Aereo's post-judgment argument that it should now be considered a service akin to a cable television distributor.¹⁴⁶

The court's summary was simple: "In light of the Supreme Court's decision, Plaintiffs are now able to demonstrate a likelihood of success on the merits. The balance of hardships also now tips in their favor and, as previously held, an injunction would not disserve the public interest."¹⁴⁷

142. 12-CV-1540, 12-CV-1543, 2014 U.S. Dist. LEXIS 150555, at 11-13 (S.D.N.Y. Oct. 23, 2014).

143. *Id.* at 39-40 (citing *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 403-04 (S.D.N.Y. 2012), *rev'd and remanded*, *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014)); *see also Aereo*, 134 S. Ct. at 2511. A discussion of the Second Circuit's decision on this case was included in this *Survey* in 2014. *See* Roy S. Gutterman, *Media Law*, 64 SYRACUSE L. REV. 867, 887 (2014) (citing *Aereo*, 134 S. Ct. at 2511; *WNET v. Aereo, Inc.*, 712 F.3d 676, 696 (2d Cir. 2013); *Aereo*, 874 F. Supp. 2d at 375)).

144. *Aereo*, 2014 U.S. Dist. LEXIS 150555, at 11.

145. *Id.* at 16-17 (citing 17 U.S.C. § 111(c)(1) (2012)).

146. *Id.* at 14-16 (citing 17 U.S.C. § 111(c)(1) (2012)) ("Doing its best to turn lemons into lemonade, Aereo now seeks to capitalize on the Supreme Court's comparison of it to a CATV system to argue that it is in fact a cable system that should be entitled to a compulsory license under §111. This argument is unavailing for a number of reasons.").

147. *Id.*, at 39-40 (citing *Aereo*, 874 F. Supp. 2d 403-04 (S.D.N.Y. 2012)).

B. Copyright—Fair Use

Two substantial decisions weighed whether unauthorized publication of photographs constituted a permissible fair use under the Copyright Act. Fair use is an affirmative defense under the act that requires analysis of four points: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect on the market.¹⁴⁸ Applying and analyzing fair use is “a mixed question of law and fact” which can sometimes be determined pre-trial.¹⁴⁹

In *North Jersey Media Group, Inc. v. Pirro*, the court denied the defendant’s motion for summary judgment in a dispute over Fox News Network’s unauthorized use of an iconic photograph of firefighters hoisting the American flag at New York City’s Ground Zero after the September 11 attacks.¹⁵⁰ Without the photograph’s owners’ consent, permission, or license, the defendant’s employee used the photograph along with an iconic World War II (WWII) photograph on a Facebook page promoting the defendant’s television show, *Justice with Judge Jeanine*.¹⁵¹ The plaintiff argued that other licensing for the photo had generated more than one million dollars, and that the plaintiff would likely have granted the defendant a license to use the photo had permission been sought.¹⁵²

As part of its fair use defense, the defendant argued “transformative use,” because it cropped the photo, used a lower-resolution version, placed the photo next to the iconic WWII Iwo Jima photo, and added a hashtag.¹⁵³ The court did not find this convincing.¹⁵⁴

The court wrote: “Thus Fox News’ commentary, if such it was, merely amounted to exclaiming ‘Me too.’ Analyzed from that perspective, the posting does not begin to constitute the creation of ‘new information, new aesthetics, new insights and understandings’ required for finding a transformative purpose.”¹⁵⁵

148. 17 U.S.C. § 107 (2012).

149. *Castle Rock Entm’t v. Carol Publ’g Grp.*, 150 F.3d 132, 137 (2d Cir. 1998) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 110 (2d Cir. 1998); *Wright v. Warner Brooks, Inc.*, 953 F.2d 731, 735 (2d Cir. 1991)).

150. 74 F. Supp. 3d 605, 609 (S.D.N.Y. 2015) (citing 17 U.S.C. § 107 (2012); *FED. R. Civ. P.* 56 (2015); 17 U.S.C. § 106 (2012)).

151. *Id.* at 610–11.

152. *Id.* at 612.

153. *Id.* at 615.

154. *Id.*

155. *N. Jersey Media Grp., Inc.*, 74 F. Supp. 3d at 617 (quoting *Castle Rock Entm’t*, 150 F.3d at 141).

Going prong-by-prong through the fair use elements, the court could not decide whether the promotional use was inherently commercial or whether the nature of a news photograph and the fact that the entire photo was used were dispositive factors.¹⁵⁶ The final factor regarding the effect on the market and the photo's economic value, though, weighed against a fair use finding.¹⁵⁷ With such substantial matters or "[m]aterial questions of fact" still unresolved, the court denied the defendant's motion for summary judgment.¹⁵⁸

A gossip website's unauthorized use of three celebrity photos failed to meet all four fair use elements in *BWP Media USA, Inc. v. Gossip Cop Media, L.L.C.*¹⁵⁹ The defendant, Gossip Cop Media, L.L.C., had an additional count dismissed on its motion to dismiss because the video depicting actress Gwyneth Paltrow riding a motor scooter, had not been registered with the U.S. Copyright Office.¹⁶⁰

The plaintiff's business focused on celebrity photography, which it licensed to publishers.¹⁶¹ There was no question regarding the plaintiff's ownership of the three photographs at issue that depicted actors Mila Kunis and Ashton Kutcher, Robert Pattison, and Liberty Ross.¹⁶² The court went through the fair use analysis with each photograph, weighing the competing interests, ultimately deciding mixed or neutral findings for the first two prongs (purpose of the use and nature of the underlying work).¹⁶³ However, the third and fourth prongs (amount and substantiality and effect on the market) weighed in the plaintiff's favor.¹⁶⁴

The court concluded "[i]n effect, the Court is asked to decide whether there is a market for evaluation of celebrity journalism as distinct from the primary celebrity journalism market. Given the nature of this inquiry, the Court must credit Plaintiff's allegations at this stage to the extent they are factual in nature."¹⁶⁵

Even though defendant argued that commentary and other elements incorporated on its website amounted to transformative use, the court was unable to rule on that issue, which was potentially factual in nature.¹⁶⁶

156. *Id.* at 619–20.

157. *Id.* at 622.

158. *Id.* at 623.

159. 87 F. Supp. 3d 499, 500 (S.D.N.Y. 2015).

160. *Id.* at 502.

161. *Id.* at 500.

162. *Id.* at 501.

163. *Id.* at 505–09.

164. *BWP Media*, 87 F. Supp. 3d at 509–10.

165. *Id.* at 510.

166. *Id.*

C. Copyright—Damages

A district court essentially let stand a jury's million dollar award against two news photography agencies in a long-standing, high-profile photo-copyright dispute in *Agence France Presse v. Morel*.¹⁶⁷ Although the court altered some elements of the jury's verdict, the bulk of the award, \$1.2 million in statutory damages, was jointly divided between Agence France Presse (AFP) and another defendant, Getty Images.¹⁶⁸

The court wrote:

The evidence was plainly sufficient for the jury to conclude that AFP's infringement was willful under either an actual knowledge or reckless disregard theory. . . . Finally, it also bears noting that AFP works in an industry where copyright was prevalent and has had extensive experience with copyright ownership. Evidence was presented that AFP has guidelines for handling copyright ownership and that the AFP employees implicated in infringing Morel's copyright were aware of those guidelines.¹⁶⁹

The court rejected the defendants' post-trial motion for remittitur because they lacked proof that the jury acted in error or that the award for damages was "intrinsically excessive."¹⁷⁰ More than two million dollars in damages were upheld in a copyright and trademark dispute between the hip-hop group the Beastie Boys and an energy drink company that used nine songs in a marketing campaign without the group's permission in *Beastie Boys v. Monster Energy Co.*¹⁷¹

D. Trademark

A motivational speaker's trademark infringement claims against Oprah Winfrey, et al., failed on summary judgment, a district court ruled.¹⁷² The plaintiff adopted the slogan "Own Your Power" as her business motto, incorporated the phrase as the name of her business, and obtained approval from the U.S. Patent and Trademark Office as a service

167. 10–CV–2730 (AJN), 2014 U.S. Dist. LEXIS 112436, at 47–48 (S.D.N.Y. Aug. 13, 2014). This case has been the subject of several reported opinions as well as a more detailed factual breakdown in Roy S. Gutterman, *Media Law*, 64 SYRACUSE L. REV. 867, 891–92 (2014).

168. *Agence France Presse*, 2014 U.S. Dist. LEXIS 112436, at 47–48.

169. *Id.* at 10–13. The court had a similar analysis for Getty's role in the infringement. *See id.* at 14–18.

170. *Id.* at 9 (interpreting FED. R. CIV. P. 50).

171. 66 F. Supp. 3d 424, 427, 465 (S.D.N.Y. 2014) (citing *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 165 (2d Cir. 1998)).

172. *Kelly-Brown v. Winfrey*, 95 F. Supp. 3d 350, 355, 366 (S.D.N.Y. 2015). *See also Kelly-Brown v. Winfrey*, 717 F.3d 295, 315 (2d Cir. 2013) (affirming a dismissal of trademark claims).

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mark.¹⁷³

The defendant, Oprah Winfrey, prominently displayed the phrase “Own Your Power” on the *O, The Oprah Magazine*’s cover for the October 2010 edition, and also wove the phrase into content inside the magazine.¹⁷⁴ This use, the plaintiff argued, violated the Lanham Act¹⁷⁵ and caused confusion that the plaintiff was somehow associated with the magazine.¹⁷⁶ The court succinctly rejected the plaintiff’s argument, and then, in a detailed legal analysis, analyzed how and why the plaintiff’s arguments failed.¹⁷⁷

Before going through point-by-point, the court summarized:

Plaintiffs’ argument fails for three reasons: 1) the phrase ‘Own Your Power’ is not protected; 2) even if the phrase were protected, there is not a shred of evidence establishing a likelihood of consumer confusion; and 3) even if Plaintiffs were to establish a likelihood of consumer confusion, the fair use defense applies.¹⁷⁸

173. *Kelly-Brown*, 95 F. Supp. 3d at 355.

174. *Id.* at 356.

175. 15 U.S.C. §1114 (2012).

176. *Kelly-Brown*, 95 F. Supp. 3d at 357.

177. *Id.*

178. *Id.* at 357–58.