MEDIA LAW

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CONTENTS

INTRODUCTION

This year's *Survey* examines a broad range of torts and statutory challenges involving media entities. This year's array of cases touches on a colorful cast of litigants, allegations, and media defendants ranging from traditional journalistic entities such as newspapers, magazines, and broadcasters to modern online and digital ventures. Litigants include hip hop artists, reality TV stars, lawyers, and an Olympian, who were the subjects of media coverage that generated litigation.

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I. DEFAMATION

A. Elements

A New York hip hop DJ's defamation claim against an iPad-only news site was partially dismissed and also modified for re-pleading with proof of special damages, the appellate division ruled in *Franklin v. The Daily Holdings, Inc.*[1] The plaintiff, John Rashad Franklin, professionally known as DJ Rashad Hayes, was identified in an article as an eyewitness to a June 2012 fight in a night club between hip hop stars Chris Brown, Drake, and their entourages.[2] The plaintiff claimed that The Daily Holdings, a subsidiary of News Corporation, published one quote that was fabricated and one that was taken out of context, harming his reputation to the tune of three million dollars.[3]

The first quote read, "So we're sitting in there. Me, a couple of others, Chris . . . Drake comes in and keeps eyeballing the table."[4] The second quote was drawn from the plaintiff's own *Twitter* feed, saying, "I was gonna start shooting in the air but I decided against it. Too much violence in the hip hop community."[5]

The plaintiff's cause of action was based on libel and libel per se, but neither claim offered any proof that he suffered any pecuniary harm, a prima facie element of the cause of action.[6] Special damages requires the plaintiff to prove that the allegedly defamatory publication led to provable financial harm.[7] In other words, the harm must "flow directly from the injury to reputation caused by the defamation and not from the effects of the defamation."[8]

The plaintiff's demand for three million dollars was "insufficient to state special damages" because he "fail[ed] to state more than a round figure."[9] Even though the plaintiff claimed his DJ career was on an upward trajectory before he was implicated in the melee, he offered no actual proof of damages, leading the court to allow him to re-plead his

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1. *See* 135 A.D.3d 87, 88–89, 96, 21 N.Y.S.3d 6, 8–9, 14 (1st Dep't 2015).
2. *Id.* at 88–89, 21 N.Y.S.3d at 8–9.
3. *See id.* at 91–93, 21 N.Y.S.3d at 10–12.
4. *Id.* at 89, 21 N.Y.S.3d at 9.
5. *Id.*
6. *Franklin*, 135 A.D.3d at 90–93, 21 N.Y.S.3d at 9–12 (quoting RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW. INST. 1977)).
7. *Id.* at 93, 21 N.Y.S.3d at 11 (quoting Agnant v. Shakur, 30 F. Supp. 2d 420, 426 (S.D.N.Y. 1998)).
8. *Id.* (quoting *Agnant*, 30 F. Supp. 2d at 426).
9. *Id.* at 93, 21 N.Y.S.3d at 12.

case at the lower court.[10] Because of the plaintiff's failure to prove damages, the court largely eschewed ruling on other elements of the tort—whether there was any liability or falsity with the allegedly fabricated quotes.[11]

The second issue the court weighed focused on whether liability could be attached to statements the plaintiff made via *Twitter*, which The Daily Holdings republished.[12] The question of the defendant's truth defense and the plaintiff's own words factored into the dismissal of this claim, the court held.[13] The "own words" defense, which has not been formally adopted by New York courts, indemnifies publishers from liability when they publish accurate quotes.[14] This defense, however, requires the court to compare the plaintiff's own words or previously published statements to the allegedly defamatory content at issue, weighing the "different effect on the mind of the average reader."[15]

The court wrote,

> Although it is conceded that defendant accurately quoted plaintiff's own words from *Twitter*, that does not necessarily mean that the statement could not have produced a worse effect on the mind of a reader than the truth as alleged by plaintiff. A reader could read the alleged defamatory statement in the context of the rest of the article and think that plaintiff was actually present in the club, prepared to shoot a firearm; whereas, a reader of plaintiff's isolated statement on *Twitter* may not have the same impression.[16]

Further, the court wrote, "Even if we were to adopt the 'own words' defense, we find that it would not apply here where a comparison of the two statements reveals the potential for them to have different effects on the mind of the reader."[17]

The final issue the court considered was News Corporation's liability as a parent company for The Daily Holdings.[18] As a matter of corporate liability, the court held that the plaintiff failed to pierce the corporate veil, which requires: "(1) the owners exercised complete domination of the corporation . . . ; and (2) that [the control] was used to

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10. *Id.*
11. *Franklin*, 135 A.D.3d at 91, 21 N.Y.S.3d at 10.
12. *Id.* at 92, 21 N.Y.S.3d at 11.
13. *Id.* at 94, 21 N.Y.S.3d at 12–13.
14. *Id.* at 95, 21 N.Y.S.3d at 13.
15. *Id.* at 94, 21 N.Y.S.3d at 12.
16. *Franklin*, 135 A.D.3d at 94, 21 N.Y.S.3d at 12–13.
17. *Id.* at 95, 21 N.Y.S.3d at 13.
18. *Id.*

commit a fraud, or wrong against the plaintiff which resulted in the plaintiff's injury."[19] Characterized as "insufficient" and "conclusory," the plaintiff's allegations lacked proof that News Corporation controlled the news site.[20] Thus, the parent company was dismissed from the action.[21]

A series of statements published on an investigative journalism website focusing on the capital and finance industry accusing a law professor of fraudulent activities could be susceptible of defamation per se.[22] The potentially defamatory statements were also accompanied by racist descriptions, accusations of racism, and said the plaintiff was involved in a relationship with a married woman, following his role as a member of the National Adjudicatory Council for the Financial Industry Regulatory Authority.[23] The defendant website, TheBlot, held out its content as protected opinion, which the court rejected.[24] The court also rejected the defendant's efforts to dismiss the case under Communications Decency Act § 230.[25]

Asserting that a person is falsely involved in criminal activity falls into one of the categories for defamation per se,[26] as do statements that "tend to injure another in his or her trade, business or profession."[27] With this blackletter law, the court wrote, "Racist terms referring to plaintiff, as stated TheBlot, together with other statements describing the plaintiff as available for hire, involved in fraud, and affiliated with felons, could reasonably be susceptible to a defamatory connotation."[28]

Additionally, the court held that the plaintiff established a prima facie case for intentional infliction of emotional distress because the

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19. *Id.* (quoting James v. Loran Realty Corp., 85 A.D.3d 619, 619, 925 N.Y.S.2d 492, 492 (1st Dep't 2011)).

20. *Id.* at 96, 21 N.Y.S.3d at 14 (first citing Morpheus Capital Advisors, LLC v. UBS AG, 105 A.D.3d 145, 153–54, 962 N.Y.S.2d 82, 89 (1st Dep't 2013); and then citing ABN AMRO Bank v. MBIA, Inc., 17 N.Y.3d 208, 229, 952 N.E.2d 463, 475, 928 N.Y.S.2d 647, 659 (2011)).

21. *Franklin*, 135 A.D.3d at 96, 21 N.Y.S.3d at 14.

22. Brummer v. Wey, No. 153583/2015, 2016 N.Y. Slip Op. 31021(U), at 1–2, 6–7 (Sup. Ct. N.Y. Cty. Mar. 1, 2016).

23. *Id.* at 2.

24. *Id.* at 3.

25. *Id.* (citing Shiamili v. Real Estate Grp., 27 N.Y.3d 281, 286, 952 N.E.2d 1011, 1015, 29 N.Y.S.2d 19, 23 (2011) ("Active provision of defamatory content by the website's developers or provider that is not merely a heading, subheading or illustration of a third-party's posts, establishes a claim that is not barred by the Communications Decency Act of 1996.").

26. *Id.* at 6–7.

27. *Brummer*, 2016 N.Y. Slip Op. 31021(U), at 7 (quoting Konig v. Wordpress.com, 112 A.D.3d 936, 937, 978 N.Y.S.2d 92, 94 (2d Dep't 2013)).

28. *Id.*

website "deliberately re-published" the offensive and potentially defamatory content through social media and other websites.[29]

A trial court properly dismissed a claim by a New York City strip club, linked to a federal investigation into human trafficking and organized crime, because the club was not adequately identified in a television news report in *Three Amigos SJL v. CBS News*.[30] The court did not address the truth or falsity of the allegations.[31] The plaintiffs complained that the TV report linked them to organized crime and other illegal abuses and activities.[32]

The court wrote,

> [T]he asserted falsity of the news reports cannot be assessed. However, even assuming the reports to be untrue, plaintiffs do not establish that the accurate reporting of events surrounding the search, including the purportedly untrue statements attributed to federal authorities, is outside the protection of the First Amendment. Even upon a cursory analysis, it is impossible to escape the conclusion that exposing news organizations to defamation claims by any business supplying goods or services to an entity reported to be engaged in illegal conduct would have a chilling effect on free speech, specifically, the dissemination of information of general interest to the public. Even where a news report is inaccurate, a defamation action is subject to summary dismissal if "the story covered a topic within the sphere of legitimate public concern."[33]

Similarly, three fraternity brothers failed to establish that a discredited *Rolling Stone* magazine article about a violent rape at the University of Virginia was about them, a federal court held, dismissing their defamation claims.[34] Though they were not named in the article as the perpetrators of an attack that may not have actually happened, the plaintiffs argued that the article defamed them as a small group.[35] "Because the allegedly defamatory statement did not apply to all [thirty-one] members of the class of 2013 or 2014, but only to an unidentified subset, it does not support the plaintiffs' claims for 'small group

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29. *Id.* at 4 (quoting Suarez v. Bakalchuk, 66 A.D.3d 419, 419, 887 N.Y.S.2d 6, 7 (1st Dep't 2009)) ("(1) extreme and outrageous conduct, (2) with intent to cause . . . severe emotional distress, (3) a causal connection between the conduct and the injury and (4) severe emotional distress.").

30. 132 A.D.3d 82, 90, 15 N.Y.S.3d 36, 42 (1st Dep't 2015), *aff'd*, 28 N.Y.3d 82, 65 N.E.3d 35, 42 N.Y.S.3d 64 (2016).

31. *Id.* at 87, 15 N.Y.S.3d at 41.

32. *Id.* at 85, 15 N.Y.S.3d at 39.

33. *Id.* at 87, 15 N.Y.S.3d at 41 (quoting Carlucci v. Poughkeepsie Newspapers, 88 A.D.2d 608, 609, 450 N.Y.S.2d 54, 55 (2d Dep't 1982)).

34. Elias v. Rolling Stone, LLC, 192 F. Supp. 3d 383, 387–88 (S.D.N.Y. 2016).

35. *Id.* at 397–98.

defamation,'" the court wrote.[36]

B. Public Figure/Private Figure/Actual Malice

In two related opinions, the Second Circuit affirmed that an expert who authenticated artwork was a limited purpose public figure who failed to establish actual malice in a defamation suit against The New Yorker magazine, in *Biro v. Condé Nast*.[37] Both decisions affirmed district court rulings, which also dismissed claims against several publications that republished the article in question.[38]

The plaintiff had assumed a prominent position in the art world, using a controversial fingerprint analysis to authenticate works of art.[39] The article, published in *The New Yorker* in 2010 relied on both named and confidential sources.[40] Some sources were critical of Biro's techniques and some stood to profit by criticizing the plaintiff.[41] The Second Circuit repeated an analysis from the district court that a reasonable reader "may walk away from the Article with a negative impression of Biro."[42]

Because of his prominence and efforts to seek attention in the art world, Biro was a limited purpose public figure.[43] The plaintiff sought public attention, invited public scrutiny, and maintained access with the media.[44] The court cited four examples of Biro's activities leading to his public figure status: (1) his participation in films and documentaries, (2) participation in frequent interviews about his art authentication techniques, (3) efforts to seek and obtain fame and clients, and (4) using the media to defend his controversial work.[45]

The plaintiff's status as a public figure, even a limited purpose public figure, triggers the actual malice standard, which under *New York Times v. Sullivan*, requires the plaintiff to prove that the statements were

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36. *Id.* at 399.

37. Biro v. Condé Nast (*Biro II*), 622 F. App'x 67, 69 (2d Cir. 2015).

38. *Id.* at 68–69.

39. *Id.* at 69.

40. *Id.*; David Grann, *The Mark of a Masterpiece*, NEW YORKER (July 12, 2010), http://www.newyorker.com/magazine/2010/07/12/the-mark-of-a-masterpiece.

41. *Biro II*, 622 F. App'x at 69.

42. Biro v. Condé Nast (*Biro I*), 807 F.3d 541, 543 (2d Cir. 2015) (quoting Biro v. Condé Nast, 883 F. Supp. 2d 441, 482 (S.D.N.Y. 2012)).

43. *Biro II*, 622 F. App'x at 69 (applying Lerman v. Flynt Distrib. Co., 745 F.2d 123, 136–37 (2d Cir. 1984)).

44. *Id.*

45. *Id.*

published with either known falsity or reckless disregard for the truth.[46] The plaintiff argued that because some of the sources harbored negative sentiments about him and the magazine published critical statements about him, the article was published with actual malice.[47] In explaining actual malice, the court noted it is "subjective" but still requires the courts to infer "objective facts."[48]

Though this standard is more rigorous than the negligence standard for private figures, actual malice does not render it impossible for a public figure like the plaintiff to level a successful claim, the court wrote, adding that courts may infer "actual malice at the pleading stage from allegations that referred to the nature and circumstances of the alleged defamation."[49]

However, the pleading and any inference accompanied in filings must be based on "plausible grounds," which the plaintiff failed to establish.[50] Facts including the use of confidential, anonymous or biased sources, or even the publisher's use of unverified information would not automatically rise to the level of actual malice.[51]

With a complicated set of facts surrounding an investigative news story about a sex abuse controversy, there were too many questions surrounding the potentially defamatory allegations about the plaintiff to justify the defendant newspaper's motion to dismiss.[52] The plaintiff, the father of a child allegedly abused at a religious school in Brooklyn, was labeled as an extortionist in newspaper articles and erroneously identified as a convicted extortionist in a tweet promoting the newspaper's stories.[53]

The court also needed more pleadings to determine if the plaintiff should be required to plead negligence as a private figure or gross irresponsibility as a matter of public interest.[54] "[A]t this early stage, [the]

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46. *Biro I*, 807 F.3d at 544 (first citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964); then citing Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967); and then citing *Lerman*, 745 F.2d at 137).

47. *Id.* at 543.

48. *Id.* at 545 (quoting Celle v. Filipino Reporter Enters., 209 F.3d 163, 183 (2d Cir. 2000)).

49. *Id.* at 546 (first citing Tiversa Holding Corp. v. LabMD, Inc., No. 13-1296, 2014 U.S. Dist. LEXIS 54632, at *20 (W.D. Pa. Apr. 21, 2014); then citing Lynch v. Ackley, No. 3:12cv537 (JBA), 2012 U.S. Dist. LEXIS 177118, at *27 (D. Conn. Dec. 14, 2012); and then citing Ciemniecki v. Parker McCay P.A., No. 09-6450 (RBK/KMW), 2010 U.S. Dist. LEXIS 55661, at *14 (D.N.J. June 7, 2010)).

50. *Id.* (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)).

51. *Biro I*, 807 F.3d at 546 (citing St. Amant v. Thompson, 390 U.S. 727, 732 (1968)).

52. Kellner v. Forward Ass'n, No. 161387/2014, 2016 N.Y. Slip Op. 30326(U), at 24 (Sup. Ct. N.Y. Cty. Feb. 23, 2016).

53. *Id.* at 1–2.

54. *Id.* at 10, 23–24 (first citing Knutt v. Metro Int'l, S.A., 91 A.D.3d 915, 917, 938

plaintiff cannot possibly plead the relevant facts concerning the defendants' methods for gathering the information, researching, writing and editing the Article. This issue must await discovery with respect to these factors," the court wrote.[55]

C. Truth Defense

A book author's suit against Amazon.com, alleging a user's comment harmed his reputation, was properly dismissed, the appellate division ruled in *Rosner v. Amazon.com*.[56] The trial court dismissed the claim on a motion to dismiss for failure to state a claim under Civil Law Procedure and Rules (CPLR) 3211(a)(7) because no reasonable reader could impute a defamatory meaning to the anonymous review.[57] An anonymous reviewer wrote that the plaintiff sent "unsolicited email advertisements peddling his book," and "I encourage you not to support such unprofessional practices" and "[h]elp discourage this nonsense."[58]

The statements at issue were not factual in nature and could reasonably be read as opinion.[59] In order for a statement to be defamatory, it must be false and factual.[60] The plaintiff also admitted that the underlying statement was actually true.[61] Furthermore, within the context of the statements, "a reasonable reader would have concluded that he or she was reading opinions, and not facts, about the plaintiff."[62]

A newspaper reporter should be able to subpoena a foreign citizen to facilitate the truth defense in a defamation lawsuit, the Second Circuit held.[63] The underlying defamation case, filed in Hong Kong, involved a *Wall Street Journal* article about casino magnate Sheldon Adelson, which

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N.Y.S.2d 134, 137 (2d Dep't 2012); and then citing Daniel Goldreyer, Ltd., v. Van De Wetering, 217 A.D.2d 434, 437, 630 N.Y.S.2d 18, 23 (1st Dep't 1995)).

55. *Id.*

56. 132 A.D.3d 835, 836–37, 18 N.Y.S.3d 155, 156–57 (2d Dep't 2015), *lv. denied*, 26 N.Y.3d 917, 47 N.E.3d 92, 26 N.Y.S.3d 762 (2016).

57. *Id.* at 836, 18 N.Y.S.3d at 157.

58. *Id.* at 836, 18 N.Y.S.3d at 156.

59. *Id.* at 837, 18 N.Y.S.3d at 157 (first citing Silverman v. Daily News, L.P., 129 A.D.3d 1054, 1055, 11 N.Y.S.3d 674, 675 (2d Dep't 2015); and then citing Russell v. Davies, 97 A.D.3d 649, 651, 948 N.Y.S.2d 394, 396 (2d Dep't 2012)).

60. *Id.* (citing Kamchi v. Weissman, 125 A.D.3d 142, 156, 1 N.Y.S.3d 169, 180 (2d Dep't 2014)).

61. *Rosner*, 132 A.D.3d at 837, 18 N.Y.S.3d at 157 (first citing Goldberg v. Levine, 97 A.D.3d 725, 726, 949 N.Y.S.2d 693, 693 (2d Dep't 2012); and then citing Salvatore v. Kumar, 45 A.D.3d 560, 563, 845 N.Y.S.2d 384, 388 (2d Dep't 2007)).

62. *Id.* (first citing *Silverman*, 129 A.D.3d at 1055, 11 N.Y.S.3d at 676; and then citing *Russell*, 97 A.D.3d at 651, 948 N.Y.S.2d at 396).

63. *In re* O'Keeffe, 650 F. App'x 83, 84–85 (2d Cir. 2016).

described him as "foul-mouthed."[64] The defendant subpoenaed the plaintiff's driver under 28 U.S.C. § 1782, to corroborate statements published in the newspaper.[65] Both the district court and the Second Circuit held that the plaintiff's opposition to the subpoena was inappropriate.[66]

D. Opinion

Critical comments about a law firm posted to a website were protected opinion, immune from liability under defamation law, the Eastern District of New York ruled.[67] Here, statements posted in the comments section to the *Automotive News* website alleged that the plaintiffs were lawyers who were engaged in a range of fraudulent activities and litigation surrounding the car finance industry.[68] The comments accompanied a news story about a lawsuit against a car sales service, and the website solicited readers to post their views on the article, akin to a letter to the editor section of a newspaper.[69] The court dismissed the complaint by converting the defendant's motion to dismiss into a summary judgment after the plaintiffs declined to engage in discovery.[70]

"Pure opinion," the court noted, is afforded absolute protection under New York law, even though its determination is sometimes murky.[71] To determine whether a statement is factual or pure opinion, the court applied the three-prong analysis employed in the Second Circuit: (1) whether the language has a readily-understood and precise meaning or whether it is indefinite and ambiguous, (2) whether the statement can be objectively characterized as "true or false," and (3) an examination of the statement's context "including the existence of any applicable customs or conventions" which may indicate to readers, listeners, or viewers that the statement is an opinion.[72]

The court wrote, "Examining the specific language used in this case makes clear that [the defendant's] statements were rhetorical opinions

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64. *Id.* at 84.

65. *Id.*

66. *See id.* at 84–85.

67. Bellavia Blatt & Crossett, P.C. v. Kel & Partners LLC, 151 F. Supp. 3d 287, 289 (E.D.N.Y. 2015), *aff'd*, No. 16-236-cv, 2016 U.S. App. LEXIS 21259 (2d Cir. Nov. 29, 2016).

68. *Id.* at 290.

69. *Id.*

70. *Id.* at 291.

71. *Id.* at 292 (quoting Kirch v. Liberty Media Corp., 449 F.3d 388, 402 (2d Cir. 2006)) (citing Levin v. McPhee, 119 F.3d 189, 196 (2d Cir. 1997)).

72. *Bellavia Blatt & Crossett, P.C.*, 151 F. Supp. 3d at 293 (citing *Kirch*, 449 F.3d at 403, n.7 (2d Cir. 2006)).

rather than facts. [The defendant's] statement is full of qualifiers—such as 'reputation,' 'word of the street' and 'whispered'—which make clear that her statement is one of opinion."[73]

The context, a news site's online comments section or forum, is a modern analogue to a newspaper's Letter to the Editor section.[74] Though online comments sections are often viewed as places for opinion, the court wrote that such comments lose their immunity if they "were based on undisclosed facts" which would lead to a defamatory statement.[75]

A television consumer report on the caloric and sugar content of ice cream was protected as a matter of opinion and properly dismissed, the appellate division ruled in *Prince v. Fox Television Stations, Inc.*[76] There was no triable matter of fact or evidence that the television reporter acted with gross irresponsibility because the television investigation was based on the reporter's in-person visits to the plaintiff's stores, independent laboratory tests of the ice cream samples by an independent expert as well as numerous interviews of key parties to the controversy.[77] "Because the report repeatedly disclosed the nutritional content of the ice cream, the reader was free to reach his or her own opinion regarding the health of the product," the court wrote.[78]

E. Privilege

A newspaper's use of an affidavit containing allegations of drug use was privileged and not defamatory, the Second Circuit affirmed in *Tacopina v. O'Keefe*.[79] This was the latest ruling in a long, contentious case.[80] *The New York Daily News* quoted allegations from an affidavit

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73. *Id.* at 294 (first citing 600 W. 115th St. Corp. v. Von Gutfeld, 80 N.Y.2d 130, 143, 603 N.E.2d 930, 937, 589 N.Y.S.2d 825, 832 (1992); and then citing Vengroff v. Coyle, 231 A.D.2d 624, 625, 647 N.Y.S.2d 530, 531 (2d Dep't 1996)).

74. *Id.* at 296 n.1.

75. *Id.* at 295–96 (citing Steinhilber v. Alphonse, 68 N.Y.2d 283, 290, 501 N.E.2d 550, 553, 508 N.Y.S.2d 901, 904 (1986)) ("Accordingly, because Kelly's statements were made on an online forum where individuals are expected to express opinions and she made clear that her comments were merely stating her opinions, a reasonable reader would understand Kelly's comments as allegations or opinions rather than comments based on undisclosed facts.").

76. 137 A.D.3d 486, 488, 26 N.Y.S.3d 528, 530 (1st Dep't 2016) (first citing Brian v. Richardson, 87 N.Y.2d 46, 53, 660 N.E.2d 1126, 1130, 637 N.Y.S.2d 347, 351 (1995); and then citing McGill v. Parker, 179 A.D.2d 98, 110, 582 N.Y.S.2d 91, 99 (1st Dep't 1992)).

77. *Id.* (citing Kruesi v. Money Mgmt. Letter, 228 A.D.2d 307, 307–08, 644 N.Y.S.2d 49, 50 (1st Dep't 1996)).

78. *Id.*

79. (*Tacopina II*), 645 F. App'x 7, 8 (2d Cir. 2016) (citing Front, Inc. v. Kahil, 24 N.Y.3d 713, 715, 720, 28 N.E.3d 15, 16, 20, 4 N.Y.S.3d 581, 582, 586 (2015)).

80. *See* Tacopina v. O'Keeffe (*Tacopina I*), No. 14 Civ. 8379 (PAC), 2015 U.S. Dist.

associated with a case involving the plaintiff, a high-profile New York lawyer.[81] The plaintiff claimed the document was leaked to the newspaper before it was filed with the court, which the court ruled did not vitiate its privileged status under Civil Rights Law § 74.[82] Inaccuracies in the quotations also did not affect the outcome.[83]

A newspaper's reliance on a U.S. Department of Justice (DOJ) press release detailing a mortgage fraud criminal conviction was protected under the fair and accurate report privilege, the appellate division affirmed in *Bouchard v. Daily Gazette Co.*[84] The plaintiff was a lawyer convicted in federal court of mortgage fraud who later sued a local newspaper for defamation.[85]

The newspaper invoked Civil Rights Law § 74, which affords protection for publication of fair and true reports based on judicial proceedings or public records attached to judicial proceedings.[86] This privilege extends to DOJ press releases, the court held.[87] Although the newspaper relied on the document, the court also stated that the report remained privileged even if the language used in the newspaper report was not verbatim, and contained minor inaccuracies.[88]

"A liberal reading of defendants' statements in the context of the article demonstrates that the statements are substantially accurate and, thus, a fair and true report of the DOJ press release," the court wrote.[89]

LEXIS 118546, at *2 (S.D.N.Y. Sept. 4, 2015) ("Tacopina sued Kerik, the Daily News, O'Keeffe, and Daily News reporter Nathaniel Vinton, alleging that they had colluded to defame him, in January 2014."), *aff'd*, 645 F. App'x 7 (2d Cir. 2016).

81. *Id.*

82. *Tacopina II*, 645 F. App'x 7, 8 (2d Cir. 2016).

83. *Id.*

84. 136 A.D.3d 1233, 1235, 25 N.Y.S.3d 730, 732–33 (3d Dep't 2016).

85. *Id.* at 1233, 25 N.Y.S.3d at 731.

86. *Id.* at 1233–34, 25 N.Y.S.3d at 731–32 (citing N.Y. CIV. RIGHTS LAW § 74 (McKinney 2009)).

87. *Id.* at 1235, 25 N.Y.S.3d at 732 (citing CIV. RIGHTS § 74).

88. *Id.* (first citing Geiger v. Town of Greece, 311 F. App'x 413, 417 (2d Cir. 2009); then citing Karedes v. Ackerley Grp., Inc., 423 F.3d 107, 119 (2d Cir. 2005); and then citing Hughes Training, Inc., Link Div. v. Pegasus Real-Time Inc., 255 A.D.2d 729, 730, 680 N.Y.S.2d 721, 723 (3d Dep't 1998)).

89. *Bouchard*, 136 A.D.3d at 1235, 25 N.Y.S.3d at 732 (first citing Alf v. Buffalo News, Inc., 21 N.Y.3d 988, 990, 995 N.E.2d 168, 169, 972 N.Y.S.2d 206, 207 (2013); and then citing Becher v. Troy Publ'g Co., 183 A.D.2d 230, 236–37, 589 N.Y.S.2d 644, 648 (3d Dep't 1992)).

F. Online Immunity

A website that posted critical and potentially defamatory statements about leadership of a cooperative housing corporation was not subject to immunity under Communications Decency Act § 230 because most of the content was created by the website's authors, not third parties, a state court ruled.[90] The statements published on the website, which was created to cover the housing cooperative itself, expressed a series of statements accusing the cooperative's leadership of a range of corrupt and fraudulent activities.[91] The court rejected the defendant's argument that the statements were protected as pure opinion and denied the plaintiff's subpoenas to unmask certain information, which was deemed irrelevant.[92]

The court also rejected the defendant's argument that the website was immune under section 230:

> Plaintiffs' complaint, however, alleges that defendants wrote and created the content of the alleged defamatory statements, and was not merely the intermediary for them. Thus, construing the allegations of plaintiffs' complaint as true, as the court must, on a motion to dismiss, the complaint may not be dismissed on this basis.[93]

G. Miscellaneous

1. Choice of Law/Jurisdiction

A company that makes exploding targets for rifle ranges failed to establish jurisdiction in New York as well as the prima facie elements to its defamation case against a television network and its local affiliate, the Southern District of New York held.[94] The plaintiff, an Oregon-based sports company, sued NBC Universal in New York because the content was produced by and aired on NBC's *Today Show*, which was broadcast on a local television station WLEX, which serves Kentucky and parts of Indiana and Ohio.[95] The action also included claims based on publication on the WLEX website.[96]

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90. Trump Vill. Section 4, Inc. v. Bezovela, 509277/2014, 2015 N.Y. Slip Op. 32507(U), at 21–22 (Sup. Ct. Kings Cty. Aug. 10, 2015) (citing 47 U.S.C. § 230(c)(1) (2012)).

91. *Id.* at 4.

92. *Id.* at 28 (citing N.Y. C.P.L.R. 3101 (McKinney Supp. 2015)).

93. *Id.* at 21–22.

94. Tannerite Sports, LLC v. NBC Universal Media, LLC, 135 F. Supp. 3d 219, 224–25 (S.D.N.Y. 2015).

95. *Id.* at 225.

96. *Id.* at 226. The headline on the web version of the story read, "Bombs for Sale: Targets containing dangerous explosives being sold legally." *Id.* at 227.

The television report at issue was an investigation into the hazards posed by the plaintiff's exploding targets, which the report linked to at least two injuries.[97] One statement, particularly offensive to the plaintiff was the reporter's demonstration and statement: "right now I am basically holding a bomb in my hand."[98] Other implications in the report intimated that targets' components could link the manufacturers to foreign and domestic terrorists and that the manufacturers cleverly circumvent a series of laws.[99]

The court granted the defendants' motions to dismiss based on both procedural and substantive grounds under Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6).[100]

New York does not readily welcome out-of-state plaintiffs for defamation claims against New York entities. CPLR 302(a)(1) requires an out-of-state plaintiff to establish substantial business transactions in order to find a venue in New York courts.[101] This requires significant minimum contacts or business transactions in the state, such as contracts within the state or the supply of goods or services within the state.[102] More importantly, with defamation claims, CPLR 302(a)(3) specifically excludes defamation from the torts available for minimum contacts within New York.[103]

"Under this standard, jurisdiction is more likely to lie when the defendant's contacts with New York were in preparation for the defamatory statement—for example, staying in New York to research a defamatory book or news broadcast."[104] Statements that are "purposefully 'written in or directed to New York,'" may also seat a case in the state.[105]

With the plaintiff's company, there were no substantial or even minimal business contacts made in the state, the court wrote.[106] Further, the court rejected the plaintiff's effort to link the affiliation agreement

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97. *Id.* at 227.

98. *Tannerite*, 135 F. Supp. 3d at 226.

99. *Id.* at 227.

100. *Id.* at 225, 236.

101. *Id.* at 230 (citing N.Y. C.P.L.R. 302(a)(1) (McKinney 2010)).

102. *Id.* (citing Symmetra Pty Ltd. v. Human Facets, LLC, No. 12 Civ. 8857 (SAS), 2013 U.S. Dist. LEXIS 83428, at *1, *30 (S.D.N.Y. June 13, 2013)).

103. *Tannerite Sports, LLC*, 135 F. Supp. 3d at 230 (citing C.P.L.R. 302(a)(3)(ii)).

104. *Id.* (citing SPCA of Upstate N.Y., Inc. v. Am. Working Collie Ass'n, 18 N.Y.3d 400, 404, 963 N.E.2d 1226, 1229, 940 N.Y.S.2d 525, 528 (2012)).

105. *Id.* (quoting *SPCA of Upstate N.Y., Inc.*, 18 N.Y.3d at 405, 963 N.E.2d at 1229, 940 N.Y.S.2d at 528).

106. *Id.* at 234.

between NBC Universal and the local broadcaster as well as the fact that some thirteen residents accessed the website in New York as justification for jurisdiction.[107]

On the substantive question of whether the broadcast contained a provably false statement of fact and were defamatory by implication, the court was equally dismissive.[108] A statement lacks the requisite liability if it is substantially true or not susceptible to a defamatory meaning.[109] In addition, the defendants argued that the statements might have also been "too imprecise to be provably false."[110]

The court wrote,

> There is no question that "Tannerite-brand binary exploding rifle targets" explode. That is their purpose. Indeed, Tannerite's Product Guide details the explosive nature of the targets and provides a multitude of warnings for their safe and proper use. As a result, the statements in the NBCU Report and NBCU Internet Article characterizing the exploding targets as bombs were substantially true, and therefore not provably false.[111]

2. Newsgathering Privilege/Shield Law

A trial court refused to compel reporters to disclose the identity of a confidential source who accused a defamation plaintiff of sexual assault.[112] The Daily News invoked New York's reporters' shield law to refuse identification of the source identified only by a first name in the newspaper story.[113] Civil Rights Law § 79-h affords reporters an absolute privilege from having to disclose the source of confidential information.[114]

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107. *Id.*

108. *Tannerite Sports, LLC*, 135 F. Supp. 3d at 235.

109. *Id.* at 233 (first citing Stepanov v. Dow Jones & Co., 120 A.D.3d 28, 34, 987 N.Y.S.2d 37, 42 (1st Dep't 2014); then citing Triano v. Gannett Satellite Info. Network, Inc., Nos. 09-CV-2497(KMK), 09-CV-2533(KMK), 2010 U.S. Dist. LEXIS 105175, at *16 (S.D.N.Y. Sept. 29, 2010); and then citing Pisani v. Westchester Cty. Health Care Corp., 424 F. Supp. 2d 710, 715 (S.D.N.Y. 2006)).

110. *Id.* at 235.

111. *Id.* at 235 (emphasis omitted).

112. Baines v. Daily News, L.P., 51 Misc. 3d 229, 231, 26 N.Y.S.3d 658, 660–61 (Sup. Ct. N.Y. Cty. 2015) (citing N.Y. C.P.L.R. 3124 (McKinney 2005)).

113. *Id.* at 232, 26 N.Y.S.3d at 661 (citing N.Y. CIV. RIGHTS LAW § 79-h(b) (McKinney 2009)).

114. CIV. RIGHTS § 79-h(b); *Baines*, 51 Misc. 3d at 232, 26 N.Y.S.3d at 661–62 ("That statute prohibits holding news professionals in contempt or otherwise penalizing them for nondisclosure of news or its source obtained in confidence through gathering news for publication." (first citing CIV. RIGHTS § 79-h(b); then citing Holmes v. Winter, 22 N.Y.3d 300, 308, 3 N.E.3d 694, 699, 980 N.Y.S.2d 357, 362 (2013); then citing Oak Beach Inn Corp.

Additionally, the newspaper account was based on a range of other materials, including trial records, transcripts and a press release, which the newspaper argued established a fair and true report under Civil Rights Law § 74.[115] The newspaper also posited a defense based on both truth of the underlying allegations and that because of the plaintiff's prior conviction, his reputation could not be harmed.[116] The court ruled that although the press release was not privileged under section 74, it could be used as part of the newspaper's truth defense.[117]

3. Miscellaneous

A defamation and securities fraud case against an investment and stock tracking website and online forum was properly dismissed, the Second Circuit affirmed in *Salvani v. InvestorsHub.com*.[118] *InvestorsHub* is a subscription-based online service that analyzes stock and securities and provides a forum for "serious investors to gather and share market insights in a dynamic environment using an advanced discussion platform."[119] The site has more than 250,000 subscribers.[120]

The plaintiff, an investment consultant, was working with a company whose stock value plummeted after an anonymous user posted unfavorable and critical comments about the plaintiff on an *InvestorsHub* forum.[121] In addition to defamation, libel, and other claims based on New York law, the plaintiff filed private causes of action under the federal Securities Exchange Act, arguing the postings intentionally sought to

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v. Babylon Beacon, Inc., 62 N.Y.2d 158, 168, 464 N.E.2d 967, 972, 476 N.Y.S.2d 269, 274 (1984); and then citing New GPC, Inc. v. Kaieteur Newspaper, Inc., 127 A.D.3d 601, 602, 8 N.Y.S.3d 123, 124 (1st Dep't 2015))).

115. *Baines*, 51 Misc. 3d at 235–36, 26 N.Y.S.3d at 664–65.

116. *Id.* at 236, 239, 26 N.Y.S.3d at 665, 667 (first citing Jones v. Plaza Hotel, 249 A.D.2d 31, 31, 671 N.Y.S.2d 231, 231 (1st Dep't 1998); then citing Guccione v. Hustler Magazine, Inc., 800 F.2d 298, 303 (2d Cir. 1986); then citing Friedman v. Rice, 47 Misc. 3d 944, 955 n.7, 5 N.Y.S.3d 816, 826 n.7 (Sup. Ct. Nassau Cty. 2015); and then citing Lee v. City of Rochester, 174 Misc. 2d 763, 778 n.1, 663 N.Y.S.2d 738, 749 n.1 (Sup. Ct. Monroe Cty. 1997)).

117. *Id.* at 237, 240, 26 N.Y.S.3d at 665, 668 (first citing Alf v. Buffalo News, Inc., 21 N.Y.3d 988, 989, 995 N.E.2d 168, 169, 972 N.Y.S.2d 206, 207 (2013); then citing Martin v. Daily News, L.P., 121 A.D.3d 90, 100, 990 N.Y.S.2d 473, 481 (1st Dep't 2014); and then citing Misek-Falkoff v. Am. Lawyer Media, Inc., 300 A.D.2d 215, 216, 752 N.Y.S.2d 647, 649 (1st Dep't 2002)).

118. (*Salvani II*), 628 F. App'x 784, 785 (2d Cir. 2015).

119. Salvani v. ADVFN PLC (*Salvani I*), 50 F. Supp. 3d 459, 464 (S.D.N.Y. 2014), *aff'd*, 628 F. App'x 784 (2d Cir. 2015).

120. *Id.*

121. *Salvani II*, 628 F. App'x at 785.

manipulate stock prices.[122]

In order to succeed on a Securities and Exchange Commission (SEC) section 10(b) claim, the plaintiff must show proof of six elements: (1) material misrepresentation or omission, (2) knowledge (scienter), (3) connection with the purchase or sale of a security, (4) reliance, (5) financial loss, and (6) loss causation.[123] The plaintiff failed to establish that the *InvestorsHub* post violated SEC law, justifying dismissal of both the federal and state claims.[124]

4. Libel in Fiction

The 2013 film, *The Wolf of Wall Street*, generated claims based on both invasion of privacy and defamation in *Greene v. Paramount Pictures Corp.*[125] The plaintiff, the former head of the corporate finance department at the financial firm Stratton Oakmont, featured in both the film and the underlying memoir by Jordan Belfort, claimed that the outrageous portrayal of a similarly-situated character in the film depicted him as morally suspect, ethically-challenged, and criminal.[126] The plaintiff claimed that the character of Nicky "Rugrat" Koskoff was based on him because they held the same position within the company, and the character bore a resemblance to the plaintiff, particularly pointing to their shared toupee.[127]

The film attempted to straddle the line between truth and fiction by stating in closing credits that it was "based on actual events"[128] while also stating the following:

> [C]ertain characters, characterizations, incidents, locations and dialogue were fictionalized or invented for purposes of dramatization. . . . With respect to such fictionalization or invention, any similarity to the name or to the actual character or history of any person . . . or any product or entity or actual incident, is entirely for dramatic purposes and not intended to reflect on an actual character, history, product or entity.[129]

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122. *Id.*; *see also* 15 U.S.C. §§ 78i, 78j (2012); 17 C.F.R. § 240.10b5-1 (2016).

123. *Salvani II*, 628 F. App'x at 786 (first citing Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005); then citing 15 U.S.C. § 78u-4(b) (2012); and then citing 17 C.F.R. § 240.10b-5 (2016)).

124. *Id.* at 786–87.

125. 138 F. Supp. 3d 226, 229 (E.D.N.Y. 2015).

126. *Id.* (noting that the author, Belfort, who was also the film's central character, was convicted and went to prison for securities fraud and money laundering).

127. *Id.* at 230 (citing Complaint at 5, *Greene*, 138 F. Supp. 3d 226 (No. 2:14CV01044)).

128. *Id.* at 229.

129. THE WOLF OF WALL STREET (Paramount Pictures 2013).

The plaintiff argued his image and likeness were used without his consent for commercial purposes under both Civil Rights Law §§ 50 and 51, as well as a vague common law invasion of privacy claim.[130] As it rejected these claims, the court explained New York's "narrow" application of privacy actions and interpretation of commercial purposes.[131] Further, the court recited a thorough list of other films and memoirs which employed similar story-telling techniques incorporating real names, characters, and identifiable sources, yet maintained protection from liability under section 51.[132]

On the privacy issue, the court summarized,

> [E]ven assuming [p]laintiff shares some physical similarities with the Koskoff Character or is identifiable because of his position at Stratton Oakmont, his Section 51 claim still must be dismissed. . . . [B]ecause the Movie does not use [p]laintiff's name, portrait, or picture, [p]laintiff's right of privacy claim under Section 51 must be dismissed.[133]

The court's decision on the defamation claims, however, survived the defendant's motion to dismiss under rule 12(b)(6) because a reasonable viewer may identify the plaintiff with the Koskoff character.[134] The court will allow the plaintiff the opportunity to re-plead this cause of action.[135] The court drew much of its rationale from a long-standing libel in fiction decision, *Davis v. Costa-Gavras*, which established that a "reasonable person viewing the [alleged defamatory work], would understand that the character portrayed in the [work] was, in actual fact, the plaintiff acting as described."[136] While "superficial similarities" are not dispositive, the overall depiction requires only a reasonable person to recognize the identity of the plaintiff in the

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130. *Greene*, 138 F. Supp. 3d at 230–31 (citing Complaint, *supra* note 127, at 1–14).

131. *Id.* at 232 (citing 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)).

132. *Id.* at 233 (first citing Cerasani v. Sony Corp., 991 F. Supp. 343, 355–56 (S.D.N.Y. 1998) (*Donnie Brasco*); then citing Wojtowicz v. Delacorte Press, 43 N.Y.2d 858, 860, 374 N.E.2d 129, 130, 403 N.Y.S.2d 218, 219 (1978) (*Dog Day Afternoon*); then citing Springer v. Viking Press, 90 A.D.2d 315, 316, 457 N.Y.S. 246, 247 (1st Dep't 1982) (*State of Grace*); and then citing Waters v. Moore, 70 Misc. 2d 372, 375–77, 334 N.Y.S.2d 428, 433–34 (Sup. Ct. Nassau Cty. 1972) (*The French Connection*)).

133. *Id.*

134. *Id.* at 234–36 (first citing Davis v. Costa-Gavras, 619 F. Supp. 1372, 1375 (S.D.N.Y. 1985); and then citing Fetler v. Houghton Mifflin Co., 364 F.2d 650, 651 (2d Cir. 1966)); *see also* FED. R. CIV. P. 12(b)(6).

135. *Greene*, 138 F. Supp. 3d at 237.

136. *Id.* at 234–35 (alterations in original) (quoting *Davis*, 619 F. Supp. at 1375) (citing *Fetler*, 364 F.2d at 651).

depiction.[137] The court also pointed out that New York does not have "consistent guidelines" to determine whether a fictional character is actually the plaintiff.[138]

The court wrote, "[B]y defendant's own admission, the Movie is not a purely fictional work. It is based on a true story. Thus, it is plausible to allege that someone who was aware of Stratton Oakmont's fraud and [p]laintiff's role at the company could reasonably associate the Koskoff character with [p]laintiff."[139]

While the court granted leave to amend and re-plead in order to allow the plaintiff to further develop the "of and concerning" prong for his defamation claim, the court did not state whether the plaintiff is a public or private figure, which would determine the standard of proof.[140] However, even if the plaintiff is a private figure, the nature of both the memoir and the film would fall into "legitimate matters of public interest," triggering the plaintiff to prove that the defamatory depictions were made with "gross irresponsibility."[141] This warranted dismissal of one defamation count.[142]

II. INVASION OF PRIVACY

A number of cases tested New York's statutory invasion of privacy tort under Civil Rights Law §§ 50 and 51.[143]

The Second Circuit affirmed dismissal of a state invasion of privacy claim by a former Olympic figure skater in *Baiul v. NBC Universal Media, LLC*.[144] Baiul has brought a series of lawsuits and appeals in a dispute stemming from her failure to appear at a televised figure skating program where she had prominent billing.[145] This latest dismissal was

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137. *See id.* at 235 (citing Batra v. Wolf, No. 116059/04, 2008 N.Y. Misc. LEXIS 1933, at *10 (Sup. Ct. N.Y. Cty. Mar. 14, 2008)).

138. *Id.* at 235 (first citing Geisler v. Petrocelli, 616 F.2d 636, 639–40 (2d Cir. 1980); then citing *Fetler*, 364 F.2d at 651–52; then citing Springer v. Viking Press, 90 A.D.2d 315, 319–20, 457 N.Y.S.2d 246, 249 (1st Dep't 1982); and then citing Carter-Clark v. Random House, Inc., 196 Misc. 2d 1011, 1014–15, 768 N.Y.S.2d 290, 294 (Sup. Ct. N.Y. Cty. 2003)).

139. *Id.* at 235 (citing *Batra*, 2008 N.Y. Misc. LEXIS 1933, at *10).

140. *Greene*, 138 F. Supp. 3d at 236–37.

141. *Id.* at 236 (citing Chapadeau v. Utica Observer-Dispatch, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975)).

142. *Id.* at 237.

143. N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2009).

144. 607 F. App'x 99, 100 (2d Cir. 2015). A district court also dismissed another motion by plaintiff. *See* Baiul v. NBC Sports, No. 15-cv-9920 (KBF), 2016 U.S. Dist. LEXIS 52291, at *2 (S.D.N.Y. Apr. 19, 2016).

145. *See* Roy S. Gutterman, *2013–14 Survey of New York Law: Media Law*, 65 SYRACUSE L. REV. 865, 888–89 (2015) (discussing the underlying facts).

focused on whether the defendant, NBC Sports, violated her statutory right to privacy under Civil Rights Law § 51.[146] The court held that including the plaintiff's name in a press release promoting the event was not a commercial use and simply "incidental."[147] The plaintiff's trademark infringement claim was also dismissed because she failed to provide evidence showing that NBC profited from her name.[148]

An invasion of privacy claim under section 51 filed by a group of actors was dismissed by the Southern District on summary judgment because they signed releases before appearing in a series of television commercials.[149] Civil Rights Law § 51 requires proof based on four prongs: (1) use of the plaintiff's name, portrait, picture, or voice; (2) in New York; (3) for purposes of advertising or trade; and (4) without written consent.[150]

Hired by a television production company, which was hired by the defendant's advertising agency, each plaintiff was paid $500 for the acting work.[151] More critical to the case, however, was the one-page release each plaintiff signed prior to performing in the commercials.[152] Efforts to discredit the contracts under general contractual terms also failed.[153]

The unauthorized use of Beyoncé's voice on her a hit song *Drunk in Love* did not violate New York State privacy laws under section 51 because it was not used for commercial or advertising purposes.[154] "Thus, when a plaintiff's name, portrait, picture or voice is used in a work of artistic expression without her written consent, she has no recourse pursuant to Civil Rights Law § 51," the court wrote.[155] The court was not persuaded by the use of the song in television promotions or other showings of the music video.[156] The matter might have also been

146. *See Baiul*, 607 F. App'x at 100 (citing CIV. RIGHTS § 51).

147. *Id.* (citing Groden v. Random House, Inc., 61 F.3d 1045, 1049 (2d Cir. 1995)).

148. *Id.* (first citing 15 U.S.C. § 1117(a) (2012); and then citing George Basch Co. v. Blue Coral, Inc., 968 F.2d 1532, 1537 (2d Cir. 1992)).

149. *See* Comolli v. Huntington Learning Ctrs., Inc., 180 F. Supp. 3d 284, 285, 290 (S.D.N.Y. 2016) (citing CIV. RIGHTS § 51).

150. *See id.* at 288 (first citing CIV. RIGHTS § 51; and then citing Molina v. Phoenix Sound, Inc., 297 A.D.2d 595, 597, 747 N.Y.S.2d 227, 230 (1st Dep't 2002)).

151. *Id.* at 287.

152. *Id.* at 285.

153. *Id.* at 289.

154. Miczura v. Knowles, No. 162333/2014, 2015 N.Y. Misc. LEXIS 4560, at *4 (Sup. Ct. N.Y. Cty. Dec. 10, 2015) (citing CIV. RIGHTS § 51).

155. *Id.* at *3.

156. *Id.* at *3–4.

preempted by federal copyright law.[157]

The use of a video clip on a late-night comedy show without the plaintiff's permission was not an invasion of privacy and was properly cited in New York, the appellate division ruled in *Sondik v. Kimmel*.[158] The court rejected the plaintiff's argument that the editing of the video in California was not sufficient to establish jurisdiction in California courts.[159] The court reiterated choice of law elements to determine whether New York had an interest in the case and its laws should be applied.[160] The court considered factors including the location of the harm, the "situs of the injury" and the residence of the plaintiff.[161]

The court wrote,

> Applying these principles, the law of New York, where the alleged injury or damage occurred, applies. Although the alleged tortious conduct, the editing of the video clip, occurred in California, the plaintiff's alleged injury occurred in New York, where he is domiciled and resides. Moreover, New York is the state with the greater interest in protecting the plaintiff, its citizen and resident.[162]

Turning to the substantive law at issue, the court refused to find that the *Jimmy Kimmel Live!* broadcast violated New York's invasion of privacy statute, Civil Rights Law §§ 50 and 51, which requires a strict commercial or advertising use of the plaintiff's image or likeness.[163] Further, the broadcast of the video clip on a comedy show satisfied the public interest exception to the law.[164]

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157. *Id.* at *1 (citing 17 U.S.C. § 301(a) (2012)).

158. 131 A.D.3d 1041, 1042, 16 N.Y.S.3d 296, 298 (2d Dep't 2015) (first citing N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2009); then citing Kane v. Orange Cty. Publ'ns, 232 A.D.2d 526, 528, 649 N.Y.S.2d 23, 26 (2d Dep't 1996); and then citing Hampton v. Guare, 195 A.D.2d 366, 366, 600 N.Y.S.2d 57, 58 (1st Dep't 1993)).

159. *Id.* at 1041, 16 N.Y.S.3d at 297.

160. *Id.* at 1042, 16 N.Y.S.3d at 298.

161. *See id.* at 1041–42, 16 N.Y.S.3d at 298 (quoting Locke v. Aston, 31 A.D.3d 33, 37–38, 814 N.Y.S.2d 38, 42 (1st Dep't 2006)).

162. *Id.* at 1042, 16 N.Y.S.3d at 298.

163. *Sondik*, 131 A.D.3d at 1042, 16 N.Y.S.3d at 298 (first citing CIV. RIGHTS §§ 50–51; then citing *Kane*, 232 A.D.2d at 526–27, 649 N.Y.S.2d at 25; and then citing *Hampton*, 195 A.D.2d at 366, 600 N.Y.S.2d at 58).

164. *Id.* (first citing CIV. RIGHTS §§ 50–51; then citing 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); then citing Freihofer v. Hearst Corp., 65 N.Y.2d 135, 140, 480 N.E.2d 349, 353, 490 N.Y.S.2d 735, 737 (1985); and then citing Walter v. NBC Television Network, Inc., 27 A.D.3d 1069, 1070, 811 N.Y.S.2d 521, 523 (4th Dep't 2006)).

III. OTHER TORTS: IIED

The New York Court of Appeals affirmed dismissal of claims of intentional infliction of emotional distress against a television network which broadcast a man's last living moments and a doctor's notification of the death to the family in an emergency room in *Chanko v. American Broadcasting Cos.*[165] The Court discussed and applied the elements of the tort of intentional infliction of emotional distress (IIED), finding the reality television show at issue, *NY Med*, did not behave outrageously or atrociously.[166] However, the Court did hold that the hospital and the emergency room doctor breached patient-doctor confidentiality rules.[167]

The reality-based television show aired the final moments of Mark Chanko's life after he had been hit by a car and was brought to the emergency room of New York-Presbyterian Hospital.[168] The plaintiff's family saw these final moments more than a year later on the television show, contending neither the decedent nor his family consented to being recorded or broadcast.[169] They did not know the encounter or medical treatment was being recorded for broadcast.[170]

Dismissed by the courts below, the issue of IIED was the only cause of action implicating the media defendants, requiring the Court to outline the tort's elements: (1) whether the defendant's conduct was extreme and outrageous, (2) whether there was intent or disregard of a "substantial probability" of causing severe emotional distress, (3) a causal connection between the injury and the conduct, and (4) severe emotional distress.[171] The plaintiffs argued that by recording the moment of death without consent constituted "extreme and outrageous" conduct, even though the moment was fleeting and the plaintiffs did not appear on screen while decedent's image was blurred.[172] However, the decedent was never identified by name, though his voice was audible as was the doctor's conversation with the family delivering the information about the

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165. *See* 27 N.Y.3d 46, 50, 49 N.E.3d 1171, 1173–74, 29 N.Y.S.3d 879, 881–82 (2016).

166. *See id.* at 56–58, 49 N.E.3d at 1178–79, 29 N.Y.S.3d at 886–87 (quoting Howell v. N.Y. Post Co., 81 N.Y.2d 115, 121–22, 612 N.E.2d 699, 702, 596 N.Y.S.2d 350, 353 (1993)) (first citing Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Cmty. Synagogue, 11 N.Y.3d 15, 22–23, 892 N.E.2d 375, 379, 862 N.Y.S.2d 311, 315 (2008); and then citing *Freihofer*, 65 N.Y.2d at 143–44, 480 N.E.2d at 355, 490 N.Y.S.2d at 737).

167. *See id.* at 50, 49 N.E.3d at 1174, 29 N.Y.S.3d at 882.

168. *Id.* at 50–51, 49 N.E.3d at 1174, 29 N.Y.S.3d at 882.

169. *Id.* at 51, 49 N.E.3d at 1174, 29 N.Y.S.3d at 882.

170. *Chanko*, 27 N.Y.3d at 51, 49 N.E.3d at 1174, 29 N.Y.S.3d at 882.

171. *Id.* at 56, 49 N.E.3d at 1178, 29 N.Y.S.3d at 886 (quoting *Howell*, 81 N.Y.2d at 121, 612 N.E.2d at 702, 596 N.Y.S.2d at 353).

172. *Id.* at 57–58, 49 N.E.3d at 1179, 29 N.Y.S.3d at 887.

death.[173] The entire segment amounted to less than three minutes.[174]

But the Court explained that the tort has a high burden of proof, which the plaintiffs were unable to establish.[175] The Court held, "[T]he broadcasting of a recording of a patient's last moments of life without consent—would likely be considered reprehensible by most people, and we do not condone it. Nevertheless, it was not so extreme and outrageous as to satisfy our exceedingly high legal standard."[176]

The plaintiffs argued that by recording and broadcasting the medical treatment, especially at the moment the doctor informed the family of the death in the emergency room, the broadcasters engaged in tortious activity.[177] The plaintiffs structured their argument around the concept of doctor-patient privilege under CPLR 4504.[178] This statute creates a privilege for doctors, attaching confidentiality to communications between doctors and patients.[179] The statute was designed and enacted to encourage and protect "unfettered" and "candid" communication between doctors and their patients and to facilitate medical treatment and established a reasonable expectation of privacy for patients receiving medical treatment or in the process of communications with their doctors.[180]

"A physician's disclosure of secrets acquired when treating a patient 'naturally shocks our sense of decency and propriety,' which is one

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173. *Id.*

174. *Id.*

175. *Chanko*, 27 N.Y.3d at 57, 49 N.E.3d at 1179, 29 N.Y.S.3d at 887.

176. *Id.* The court further added that tort has not been successfully applied to trespassing journalists or television reports identifying rape victims. *Id.* at 58, 49 N.E.3d at 1179, 29 N.Y.S.3d at 887 (first citing *Howell*, 81 N.Y.2d at 126, 612 N.E.2d at 705, 596 N.Y.S.2d at 356; and then citing Doe v. Am. Broad. Cos., 152 A.D.2d 482, 484, 543 N.Y.S.2d 455, 456 (1st Dep't 1989)).

177. *Id.* at 50, 49 N.E.3d at 1173–74, 29 N.Y.S.3d at 881–82.

178. *Id.* at 51–52, 49 N.E.3d at 1174–75, 29 N.Y.S.3d at 882–83 (first citing N.Y. C.P.L.R. 5515 (McKinney 2014); then citing Hecht v. City of New York, 60 N.Y.2d 57, 60–61, 454 N.E.2d 527, 529, 467 N.Y.S.2d 187, 189 (1983); then citing *In re* Harmon, 73 A.D.3d 1059, 1062, 900 N.Y.S.2d 761, 764 (2d Dep't 2010); then citing Goshen v. Mutual Life Ins., 98 N.Y.2d 314, 326, 774 N.E.2d 1190, 1196–97, 746 N.Y.S.2d 858, 864–65 (2002); then citing Leon v. Martinez, 84 N.Y.2d 83, 88, 638 N.E.2d 511, 513, 614 N.Y.S.2d 972, 974 (1994); then citing N.Y. C.P.L.R. 4504(a) (McKinney 2007); and then citing *In re* Grand Jury Investigation in N.Y. Cty., 98 N.Y.2d 525, 529, 779 N.E.2d 173, 175, 749 N.Y.S.2d 462, 464 (2002)).

179. *Chanko*, 27 N.Y.3d at 52, 49 N.E.3d at 1175, 29 N.Y.S.3d at 883 (citing C.P.L.R. 4504(a)).

180. *Id.* (quoting Dillenbeck v. Hess, 73 N.Y.2d 278, 285, 536 N.E.2d 1126, 1130, 539 N.Y.S.2d 707, 711–12 (1989)) (citing *In re Grand Jury Investigation in N.Y. Cty.*, 98 N.Y.2d at 529, 779 N.E.2d at 175, 749 N.Y.S.2d at 464).

reason it is forbidden," the Court wrote.[181]

Breaching the doctor-patient privilege requires the plaintiff to establish five elements: (1) the existence of a doctor-patient relationship, (2) the doctor's "acquisition" of information relating to treating the patient, (3) disclosure of confidential information to a third party not related to the patient's medical treatment, (4) lack of consent by the plaintiff, and (5) damages.[182] Because the medical staff "clearly" revealed private medical information to the television crew, which was broadcast, the hospital could be liable for breaching the tort.[183]

The hospital, by allowing the recording crew in the emergency room without the plaintiffs' consent, may have breached the tort, the Court held.[184] This also touched on the fact that as many as thirteen people involved in the editing and production process were privy to this information.[185] The question of damages and other factual matters will be ironed out through discovery, the Court held.[186]

IV. INTELLECTUAL PROPERTY

A. Copyright: General

An Internet-based streaming company that had been ordered to discontinue its online delivery of copyrighted television shows was held in contempt for violating an injunction, the Second Circuit affirmed in *CBS Broadcasting, Inc. v. FilmOn.com, Inc.*[187] The defendant, FilmOn, had developed technology that allowed online streaming of television shows to computers or other mobile devices, which was ultimately determined to violate the copyrights owned by the creators and television networks.[188] The underlying facts and arguments in this case are similar to those decided by the U.S. Supreme Court in 2014's *American*

181. *Id.* at 53, 49 N.E.3d at 1176, 29 N.Y.S.3d at 884 (quoting *Dillenbeck*, 73 N.Y.2d at 285, 536 N.E.2d at 1131, 539 N.Y.S.2d at 712).

182. *Id.* at 53–54, 49 N.E.3d at 1176, 29 N.Y.S.3d at 884 (first citing Burton v. Matteliano, 81 A.D.3d 1272, 1274, 916 N.Y.S.2d 438, 440 (4th Dep't 2011); then citing MacDonald v. Clinger, 84 A.D.2d 482, 485–86, 446 N.Y.S.2d 801, 805 (4th Dep't 1982); then citing Doe v. Roe, 93 Misc. 2d 201, 210–13, 400 N.Y.S.2d 668, 674 (Sup. Ct. N.Y. Cty. 1977); and then citing Rut v. Young Adult Inst., Inc., 74 A.D.3d 776, 777, 901 N.Y.S.2d 715, 717 (2d Dep't 2010)).

183. *Id.* at 55, 49 N.E.3d at 1177, 29 N.Y.S.3d at 885.

184. *Chanko*, 27 N.Y.3d at 55–56, 49 N.E.3d at 1177–78, 29 N.Y.S.3d at 885–86.

185. *Id.* at 55, 49 N.E.3d at 1177, 29 N.Y.S.3d at 885.

186. *Id.* at 56, 49 N.E.3d at 1178, 29 N.Y.S.3d at 886.

187. (*CBS Broad. II*), 814 F.3d 91, 95 (2d Cir. 2016).

188. *Id.* at 96, 103.

Broadcasting Co., Inc. v. Aereo, Inc.[189]

FilmOn's argument that its service did not violate copyrights because it was either a digital storage entity or operating like a cable television operator, entitled to a compulsory license for retransmission under the Copyright Act,[190] was not convincing at trial.[191] After the district court issued an injunction, FilmOn tweaked its system and offered subscribers a video-on-demand service, which the district court said violated the terms of the injunction.[192] The company and its CEO were held in contempt of the court order and fined ninety thousand dollars plus attorneys' fees.[193]

The court wrote, "The district court did not err when it determined that the proof of FilmOn's noncompliance was supported by clear and convincing evidence. [*Aereo*] made clear that deploying the Teleporter System within the Second Circuit would violate the Plaintiffs' copyright."[194]

A story proposal for a dating reality television show was not substantially similar to the television program, *Married at 1st Sight*, the Southern District ruled in *Williams v. A+E Television Networks*.[195] The plaintiff had written and registered her proposal and description of a reality television dating/matchmaking show, known as a "treatment," which was similar to the A+E Network's show, which first aired in 2014.[196] The plaintiff had also uploaded the treatment to a website, *The Writer's Vault*, where writers submit and sometimes sell their proposals or "treatments."[197] An executive for the defendant accessed and downloaded the plaintiff's treatment two years before production.[198]

Though the treatment and the show had several similar elements, the

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189. *See generally* 134 S. Ct. 2498 (2014) (holding that Aereo, Inc. infringed its exclusive right under the Copyright Act of 1976 by selling its subscribers a service that allows them to watch television programs over the Internet at about the same time as the programs are broadcasted); Roy S. Gutterman, *2014–15 Survey of New York Law: Media Law*, 66 SYRACUSE L. REV. 1075, 1093 (2016); Roy S. Gutterman, *2012–13 Survey of New York Law: Media Law*, 64 SYRACUSE L. REV. 867, 887 (2014).

190. *See* 17 U.S.C. § 111(c)(1) (2012).

191. CBS Broad., Inc. v. FilmOn.com, Inc. (*CBS Broad. I*), No. 10 Civ. 7532 (NRB), 2014 U.S. Dist. LEXIS 101894, at *9–10 (S.D.N.Y. July 24, 2014).

192. *Id.* at *4–5 (quoting CBS Broad., Inc. v. FilmOn.com, Inc., No. 10 Civ. 7532 (NRB), 2013 U.S. Dist. LEXIS 130612, at *28 (S.D.N.Y. Sept. 10, 2013)).

193. *Id.* at *19–20.

194. *CBS Broad. II*, 814 F.3d 91, 99 (2d Cir. 2016).

195. 122 F. Supp. 3d 157, 163 (S.D.N.Y. 2015).

196. *Id.* at 160–61.

197. *Id.* at 159.

198. *Id.*

plaintiff's copyright action could not convince the court that those similarities were sufficiently original under the Copyright Act to support the plaintiff's claim.[199] The similarities were "common stock ideas" and "unoriginal *scènes à faire*" that cannot be copyrighted.[200]

The court wrote,

> [T]he plaintiff does not own an enforceable copyright in the general idea of a reality show about arranged marriages or marriage between strangers . . . . The Complaint alleges numerous similarities between the Treatment and "Married at First Sight," however, the alleged similarities consist primarily of unprotectable *scènes à faire*.[201]

The court also rejected claims for contributory and vicarious infringement.[202]

B. Copyright: Fair Use

Certain functions of a digital recording system that allow subscribers to record television and radio programming for retrieval from a searchable database could be a fair use, the Southern District held in *Fox News Network v. TVEyes, Inc.*[203] The plaintiff, a television cable news network sought to block the defendant, arguing that its system and practices infringed on its copyrights under the Copyright Act.[204]

The archiving function was an acceptable fair use while the court rejected fair use for the defendant's emailing, downloading, and search functions.[205] The affirmative defense of fair use has four fact-sensitive prongs: (1) the purpose and character of the use, (2) nature of the underlying copyrighted material, (3) the amount and substantiality used, and (4) the effect on the market.[206]

While this case is a modern test for new technology and the media, the court presented an interesting discussion of First Amendment values, in particular Justice Oliver Wendell Holmes's invocation of the "marketplace of ideas" to free speech matters,[207] set forth in his famous

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199. *Id.* at 164 (quoting Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 63 (2d Cir. 2010)).

200. *Williams*, 122 F. Supp. 3d at 163.

201. *Id.*

202. *Id.* at 165.

203. 124 F. Supp. 3d 325, 337–38 (S.D.N.Y. 2015).

204. *Id.* at 327 (citing 17 U.S.C. § 101 (2012)).

205. *Id.* at 328.

206. *Id.* at 330–31 (citing 17 U.S.C. § 107 (2012)).

207. *Id.* at 334 (first quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); and then quoting Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 537−38 (1980)).

dissent in the 1919 free speech/incitement case, *Abrams v. United States*.[208]

The court wrote,

> Democracy works best when public discourse is vibrant and debate thriving. But debate cannot thrive when the message itself (in this case, the broadcast) disappears after airing into an abyss. TVEyes' service allows researchers to study Fox News' coverage of an issue and compare it to other news stations; it allows targets of Fox News commentators to learn what is said about them on the network and respond; it allows other media networks to monitor Fox's coverage in order to criticize it. TVEyes helps promote the free exchange of ideas, and its archiving feature aids that purpose.[209]

C. Copyright: Miscellaneous

A third-party complaint against the reality TV star of *Duck Dynasty* over novelty royalties was not properly seated in federal courts in New York, the Southern District ruled.[210] This case involved a lawsuit over royalties between the A+E television network and the Wish Factory, a company licensed to manufacture and sell *Duck Dynasty* novelties, including kites and three-dimensional toy ducks.[211] The defendant filed a third-party complaint against the show's star, Phil Robertson, after he made numerous homophobic, racist, and other inflammatory remarks in interviews, which prompted retailers to cancel orders for *Duck Dynasty* merchandise, thus decimating sales.[212]

The court rejected Wish Factory's complaint because it could not establish general, personal or specific jurisdiction in New York.[213] Because Robertson lived in Louisiana and conducted no business or tortious activities in the state, much less owning property or deriving substantial benefits in the jurisdiction, the court granted the defendant's motion to dismiss.[214] The court also rejected Wish Factory's argument that because Robertson and A+E had a contractual relationship, that would avail jurisdiction in New York.[215]

The court wrote,

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208. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

209. *Fox News Network*, 124 F. Supp. 3d at 334.

210. A+E Television Networks, LLC v. Wish Factory, No. 15-CV-1189 (DAB), 2016 U.S. Dist. LEXIS 33361, at *3 (S.D.N.Y. Mar. 11, 2016).

211. *Id.*

212. *Id.* at *6−8.

213. *Id.* at *13 (citing N.Y. C.P.L.R. 302(a) (2010)).

214. *Id.* at *20.

215. *A+E Television Networks, LLC*, 2016 U.S. Dist. LEXIS 33361, at *22.

> The allegation that Mr. Robertson participated in an interview, which resulted in his comments being published somewhere by a magazine with an office in New York and with national readership, is not sufficient to establish that he knew or should have known that he would cause injury in New York such that he would be called into the state to answer for his conduct.[216]

Part of a photographer's copyright infringement suit against an educational book publisher was barred because his claim came after the three-year statute of limitations, the Southern District ruled.[217] The photographer claimed the publisher had been using his nature photographs without his permission for years, several years beyond the statutory period.[218] The plaintiff had registered many of his works with the U.S. Copyright Office, a requirement for an infringement action.[219] The court rejected the plaintiff's request to toll the statute of limitations because he was unable to show any proof of fraudulent activity.[220] Because the photographs in question span an expansive timeframe, the court restricted the action to infringements after May 16, 2010.[221]

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216. *Id.* at *29–30.

217. Wu v. John Wiley & Sons, Inc., No. 14 Civ. 6746 (AKH) (AJP), 2015 U.S. Dist. LEXIS 120707, at *2 (S.D.N.Y. Sept. 10, 2015).

218. *Id.* at *1, *9 (citing 17 U.S.C. § 507(b) (2012)).

219. *Id.* at *28.

220. *Id.* at *21–22.

221. *Id.* at *2.