

MEDIA LAW

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INTRODUCTION

This year's *Survey* covers a wide range of media law and First Amendment cases in state and federal courts. Cases cover a cast of colorful characters and high-profile fact patterns with implications on a variety of both traditional media and modern media.

I. FIRST AMENDMENT AND PRIOR RESTRAINTS

When President Donald Trump and the White House blocked several critics from the President's Twitter feed, it violated the users' First Amendment rights, the Second Circuit held in *Knight First*

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Amendment Institute at Columbia University v. Trump.¹ Represented by the Knight First Amendment Institute at Columbia University, the seven plaintiffs argued that because they were critical of the president, they were blocked from following the president on Twitter, which deprived them of the First Amendment rights to obtain and criticize public policy directives disseminated on Twitter.² The court affirmed a granting of summary judgment by the Southern District of New York.³

In an opinion which delved into free speech standards in modern internet-based public fora like Twitter, the court also provided a basic explanation of how Twitter fits into the modern marketplace of ideas where speakers obtain information, exchange ideas and opinions.⁴ Though owned and operated by private entities, Twitter and similar social media platforms are the new, modern and “metaphysical” public fora, not constrained by geography or other barriers.⁵

Twitter’s “interactive space” should not be blocked to critics, the court held.⁶ Because the president and the White House use the Twitter account to communicate with citizens, promote the president’s agenda, issue policy objectives and even fire employees, the social media platform was indisputably a public forum.⁷ This created a new form of “state-run” media.⁸ Even though there were technical “workarounds” that would have enabled the plaintiffs to obtain the information or the Tweets, such alternative measures were too burdensome and would still violate the plaintiffs’ First Amendment rights.⁹

The president and the White House argued that because his Twitter feed was established in 2009, years before he became president, it was a non-public venue which facilitated the president’s own First Amendment rights.¹⁰ The court found the president’s arguments unconvincing.¹¹ “Because the President, as we have seen, acts in an official capacity when

1. 928 F.3d 226, 239 (2d Cir. 2019) (citing U.S. CONST. amend. I).

2. *Id.* at 232.

3. *Id.* at 234.

4. *Id.* at 237 (stating that the basic principles of free speech do not change depending on the medium used) (first citing *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–36 (2017); and then citing *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011)).

5. *Id.* at 234, 237 (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995)).

6. *Knight First Amendment Inst.*, 928 F.3d at 234.

7. *Id.* at 236–37.

8. *Id.* at 231.

9. *Id.* at 238–39.

10. *Id.* at 234.

11. *Knight First Amendment Inst.*, 928 F.3d at 235 (citing *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547–52 (1975)).

he tweets, we conclude that he acts in the same capacity when he blocks those who disagree with him,” the court wrote.¹² In addition to pointing out that the president and White House staffers acknowledged that the Twitter feed was an official government organ, the court also pointed to such policies as the Presidential Records Act and the National Archives which is cataloging the president’s tweets for historical purposes.¹³

Viewpoint discrimination by the government, particularly aimed at critics as it was here, violates the First Amendment, the court held.¹⁴ The court’s conclusion aptly summarized the case and the issues:

The irony in all of this is that we write at a time in the history of this nation when the conduct of our government and its officials is subject to wide-open, robust debate. This debate encompasses an extraordinarily broad range of ideas and viewpoints and generates a level of passion and intensity the likes of which have rarely been seen. This debate, as uncomfortable and as unpleasant as it frequently may be, is nonetheless a good thing. In resolving this appeal, we remind the litigants and the public that if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less.¹⁵

II. DEFAMATION

A. *Elements*

A government official—a water district superintendent—successfully established a case for a preliminary injunction, ordering a critic who accused him of corruption on social media to take down the potentially defamatory content, a court ruled in *Carey v. Ripp*.¹⁶

The allegations of corruption about plaintiff posted on defendant’s Facebook page satisfied the prima facie elements of defamation, the court held, establishing that the false statements could “expose a person to public contempt, hatred, ridicule, aversion, or disgrace.”¹⁷

In seeking a preliminary injunction or temporary restraining order, the plaintiff must establish three elements: (1) irreparable harm; (2)

12. *Id.* at 236.

13. *Id.* at 232, 235 (citing 44 U.S.C. § 2202 (2012)).

14. *Id.* at 236 (citing *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019)).

15. *Id.* at 240.

16. 60 Misc. 3d 1016, 1017–19, 77 N.Y.S.3d 863, 864–65 (Sup. Ct. Nassau Cty. 2018) (citing *Sachs v. Matano*, 50 Misc. 3d 420, 421, 22 N.Y.S.3d 310, 312 (Sup. Ct. Nassau Cty. 2015)).

17. *Id.* at 1017, 77 N.Y.S.3d at 864 (citing *Davis v. Boenheim*, 24 N.Y.3d 262, 268, 22 N.E.3d 999, 1004, 998 N.Y.S.2d 131, 136 (2014)).

likelihood of success on the merits; and (3) a balancing of the equities favors an injunction.¹⁸

A local newspaper published a story about the controversy, quoting from the Facebook posts, but ended up removing the content.¹⁹ But with the prima facie elements of defamation satisfied, the court ordered the defendant to remove the offending posts from his Facebook page.²⁰

The news website *BuzzFeed* secured summary judgment in a far-reaching libel suit by a European publisher of questionable news content, the district court ruled in *Leidig v. BuzzFeed, Inc.*²¹ *BuzzFeed* published a story about the plaintiff's news operation, under the headline, "The King of Bullsh*t News," exposing the plaintiff's outrageous, unbelievable and false news accounts.²²

Unable to establish the prima facie elements of libel—a written false statement of fact about the plaintiff published with either negligence or actual malice with proof of special damages or per se actionability—the court granted summary judgment.²³ "Despite truth often being framed as a defense to libel, the burden of proving the falsity of a statement rests with the plaintiff," the court wrote.²⁴

Though the defendant only has to establish "substantial truth," summary judgment was still applicable here, the court held.²⁵

B. Truth

A dispute between a former patient and his doctor that went from derogatory Facebook posts to a website defendant created using plaintiff's name could go forward under defamation per se, a trial court ruled in *Buch v. Teman*.²⁶ The defendant published a number of

18. *Id.*

19. *Id.* at 1018, 77 N.Y.S.3d at 865.

20. *Id.* at 1018–19, 77 N.Y.S.3d at 865 (citing *Sachs*, 50 Misc. 3d at 423, 22 N.Y.S.3d at 313)).

21. 371 F. Supp. 3d 134, 137 (S.D.N.Y. 2019) (citing FED. R. CIV. P. 56). Earlier proceedings on this case were covered in last year's *Survey*. See Roy S. Gutterman, *Media Law*, 68 SYRACUSE L. REV. 1011 (2018).

22. *Leidig*, 371 F. Supp. 3d at 137–38.

23. *Id.* at 142, 150; (first citing *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 176 (2d Cir. 2000); then citing *Church of Scientology Int'l v. Eli Lilly & Co.*, 778 F. Supp. 661, 666 (S.D.N.Y. 1991)).

24. *Id.* at 143.

25. *Id.* at 143–44 (citing *Blair v. Inside Edition Prods.*, 7 F. Supp. 3d 348, 358 (S.D.N.Y. 2014) ("Plaintiffs' inability to identify a genuine dispute of material fact is best exemplified by their decision to contest only one of the over two hundred numbered paragraphs in *BuzzFeed's* Rule 56.1 Statement.")).

26. No. 157336/2018, 2019 N.Y. Slip Op. 51225(U), at 2 (Sup. Ct. N.Y. Cty. May 13, 2019).

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statements on both platforms criticizing the doctor, who also performed as a comedian, accusing him of malpractice and fraud and other misbehavior.²⁷ The defendant's motion to dismiss based on truth or an admission plaintiff had made in an unrelated affidavit in which he quoted another patient who called him a "quack" and a "fraud," was not sufficient to establish truth or undisputed evidence to establish a truth defense, the court held.²⁸

A series of additional motions for dismissal based on venue and other procedural issues were denied and a number of counterclaims were also dismissed.²⁹

III. OF AND CONCERNING/ACTUAL MALICE

A lawyer associated with the subject of the memoir and film *The Wolf of Wall Street* was unable to prove that he was defamed with actual malice in both the book and the film, a district court ruled in *Greene v. Paramount Pictures Corp.*³⁰ This was the plaintiff's second round in the court after his initial invasion of privacy and private figure defamation claims were dismissed in an earlier decision in 2015.³¹ The court permitted the plaintiff to refile an amended complaint pleading libel as a public figure.³²

The court dismissed the claim for libel per se on a motion for summary judgment after numerous witnesses testified that they did not associate the character in the film known as Nicky "Rugrat" Koskoff with the plaintiff even though both shared similar jobs and titles in both the real Stratton Oakmont finance company as well as the one depicted in the film.³³ The plaintiff also pointed to physical similarities he shared with the character, including descriptions of his weight, belly, and toupee.³⁴

The film, a work of fiction, included a disclaimer noting that while the film depicted some actual events, it also contained fictionalized and composite characters and dramatizations.³⁵

27. *Id.* The defendant, who was also a comedian, also posted comments urging people not to go to plaintiff's comedic performances. *Id.*

28. *Id.* at 5.

29. *Id.* at 5, 9–11.

30. 340 F. Supp. 3d 161, 163 (E.D.N.Y. 2018).

31. *See* *Greene v. Paramount Pictures Corp.* (*Greene I*), 138 F. Supp. 3d 226, 231, 233, 235 (E.D.N.Y. 2015).

32. *Greene*, 340 F. Supp. 3d at 167.

33. *Id.* at 163, 166–67.

34. *Id.* at 166–67.

35. *Id.* at 165. The disclaimer specifically stated:

With this libel claim, there are two critical elements at play, which the court referred to as potential “tangling” of both truth and falsity relating to parody and satire: was the character, indeed, depicting the plaintiff satisfying the “of and concerning” prong for defamation and whether the depictions in the film were false and published with actual malice.³⁶

A finding of falsity could be problematic, if not impossible under the First Amendment because the film was a fictionalized and even satirical depiction.³⁷ Because the actual malice standard requires public figures to prove that the false material was published knowing it was false or with reckless disregard for the truth, works of fiction or satire run the potential risk of an “automatic actual malice,” the court warned.³⁸

The court analyzed:

The actual malice inquiry for fictional characters can likewise be reframed to avoid “automatic actual malice.” As discussed, a statement will only be false if the character is found to be “of and concerning” the plaintiff. Thus, determining whether the defendant acted with knowledge or reckless disregard in making a false statement is dependent on whether the defendant acted with knowledge or reckless disregard in making a statement “of and concerning” the plaintiff through the portrayal of a fictional character. This inquiry collapses into whether the defendant knew or acted with reckless disregard to whether the portrayal of the character would be “of and concerning” the plaintiff.³⁹

The court held that the filmmakers and other in the chain of production did not act with actual malice because: (1) the film was a fictionalized account; (2) the character at issue was a “composite” of three different people with different names, employment and personal histories; (3) the film’s disclaimer; (4) the defendant’s evidence of a “subjective understanding” that the character in the film was not the plaintiff; and (5) the plaintiff’s failure to establish that defendant acted

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. *Id.*

36. *Greene*, 340 F. Supp. 3d at 169 (quoting *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1194 (9th Cir. 1989)).

37. *Id.* at 170 (first quoting *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 162 (Tex. 2004); then citing U.S. CONST. amend. I).

38. *Id.* (quoting *New Times, Inc.*, 146 S.W.3d at 162).

39. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 564, cmt. f. (AM. LAW INST. 2017)).

with actual malice or “entertained serious doubts” about the truth of the production.⁴⁰

IV. PUBLIC/PRIVATE FIGURE

The Winklevoss twins, largely made famous in the movie *The Social Network* as well as their Olympic participation, radio broadcasts and frequent media exposure were deemed public figures in a defamation case, the appellate division affirmed in *Winklevoss v. Steinberg*.⁴¹ The brothers brought a defamation claim against a prospective business seller who made comments about them in the media, including the *New York Post*, after their stock deal disintegrated.⁴²

Their libel claims were dismissed because as both limited purpose and general public figures, they were unable to prove that they were defamed with actual malice.⁴³

The court stated:

Through their voluntary participation in numerous interviews, in widely-covered conferences and meetings with entrepreneurs, and in their own radio broadcasts, they have attracted public attention to themselves as investors in start-ups, have voluntarily injected themselves into the world of investing, and have sought to establish their reputation as authorities in the field.⁴⁴

The court added that their general fame was enhanced by their portrayal in the film and their participation in the Olympics.⁴⁵

V. LIBEL BY IMPLICATION/TRUTH/§ 74

A newspaper article about a prominent family and its ancient antiquity business was not libelous or libel by implication, not materially false and was substantially accurate, a state court ruled in *Aboutaam v.*

40. *Id.* at 172 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

41. 170 A.D. 3d 618, 619, 96 N.Y.S.3d 561, 562 (1st Dep’t 2019) (first citing *Perez v. Violence Intervention Program*, 116 A.D.3d 601, 601, 984 N.Y.S.2d 348, 349 (1st Dep’t 2014); then citing *Farber v. Jefferys*, 103 A.D.3d 514, 515, 959 N.Y.S.2d 486, 487 (1st Dep’t 2013); and then citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)).

42. *Id.* at 618–19, 96 N.Y.S.3d at 562.

43. *Id.* at 619, 96 N.Y.S.3d at 562 (first citing *Huggins v. Moore*, 94 N.Y.2d 296, 301, 726 N.E.2d 456, 459, 704 N.Y.S.2d 904, 907 (1999); then citing *James v. Gannett Co.*, 40 N.Y.2d 415, 423, 353 N.E.2d 834, 840, 386 N.Y.S.2d 871, 877 (1976); then citing *Farber*, 103 A.D.3d at 515; and then citing *Gross v. New York Times Co.*, 281 A.D.2d 299, 299, 724 N.Y.S.2d 16, 17 (1st Dep’t 2001)).

44. *Id.* (first citing *Perez*, 116 A.D.3d at 601, 984 N.Y.S.2d at 349; then citing *Farber*, 103 A.D.3d at 515, 959 N.Y.S.2d at 487).

45. *Id.* (citing *Gertz*, 418 U.S. at 342).

*Dow Jones & Co.*⁴⁶ The plaintiffs alleged eight passages, headlines, subheads, photographs and even the page layout harmed their reputations and the family business by linking the family and its business to investigations of the sale of antiquarian and ancient objects looted by ISIS in Syria.⁴⁷ The court dismissed all claims in a lengthy and detailed opinion analyzing each claim and defense.⁴⁸

The plaintiff submitted a survey he conducted in which the respondents it polled expressed that they had a negative impression of the plaintiff and his business after reading the articles which referenced international law enforcement investigations and other allegations linking his family to illegal operations.⁴⁹

On the defamation by implication claims, the court found that plaintiff did not meet the “rigorous showing” standard required to link or implicate the plaintiff to a defamatory statement.⁵⁰ The inference for libel by implication has to be strong, intended or endorsed.⁵¹

Applying the standards set forth in *Stepanov v. Dow Jones & Co.*, the court held the statements were “substantially true” and the “plaintiff must make a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference.”⁵²

Further, the court held the plaintiffs to be limited purpose public figures, thus requiring them to prove that the purportedly false statements were published with actual malice, which they could not do.⁵³ The court also reiterated important blackletter law regarding headlines, arguing they were a fair representation of the underlying story as well as rejecting

46. *Aboutaam v. Dow Jones & Co.*, No. 156399/2017, 2019 N.Y. Slip Op. 30747(U), at 2, 20 (Sup. Ct. N.Y. Cty. Mar. 22, 2019) (citing N.Y. CIV. RIGHTS LAW § 74 (McKinney 2019)).

47. *Id.* at 2.

48. *Id.* at 41.

49. *Id.* at 4.

Most critically, however, this Court rejects the idea that a plaintiff should be allowed to keep his defamation lawsuit alive by simply commissioning a survey that indicates that certain people have a negative opinion of him based on the allegedly libelous article. To allow such would effectively end the rule—for such wealthy defamation plaintiffs—that it is the job of the court to determine in the first instance “whether particular words are defamatory.” *Id.* at 28 (quoting *Aronson v. Wiersma*, 65 N.Y.2d 592, 593, 483 N.E.2d 1138, 1139, 493 N.Y.S.2d 1006, 1007 (1985)).

50. *Aboutaam*, 2019 N.Y. Slip Op. 30747(U), at 25.

51. *Id.*

52. *Id.* at 21–22 (quoting 120 A.D.3d 28, 37–38, 987 N.Y.S.2d 37, 44 (1st Dep’t 2014)).

53. *Id.* at 5, 40.

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arguments that the text and photo layout created a defamatory implication.⁵⁴

The court wrote:

Plaintiff would essentially hold that newspapers can be liable for defamation because they place a picture of a person too closely to a certain photograph which somehow conjures up negative emotions in the reader even though the individual's picture and the other picture are relevant to the subject matter of the story. Such a rule has absolutely no basis in this state's law, and such a rule would have a chilling effect on the inclusion of photographs in newspaper articles.⁵⁵

The court concluded that the newspaper articles could not be read as defamatory because plaintiff was unable to prove anything to be false and that some allegations drawn from law enforcement investigations were substantially true and accurate reports from public records under Section 74.⁵⁶

The court concluded:

It may be that being subject to an investigation by law enforcement carries a stigma. Here, Plaintiff alleges that this stigma has caused a 96% drop in sales at his gallery. By no means does this Court's decision seek to undermine the serious consequences that sometimes follow a news organization's decision to publish details of an ongoing investigation by law enforcement. However, the decision to truthfully report on an ongoing law enforcement investigation is ultimately a question of journalistic judgment. Unless the reporting on such an investigation is materially false or affirmatively creates false suggestions, it is not for the courts to question an editorial judgment to report on an ongoing investigation.⁵⁷

VI. TRUTH/OPINION

A defamation claim by a married couple—a lawyer and judge—was properly dismissed because a newspaper story detailing misuse of a courthouse parking space was substantially true, the appellate division affirmed in *Udell v. NYP Holdings, Inc.*⁵⁸ The two plaintiffs would be unable to prove that the statements were published with actual malice,

54. *Id.* at 23, 25 (quoting *Schermerhorn v. Rosenberg*, 73 A.D.2d 276, 286–87, 426 N.Y.S.2d 274, 283 (2d Dep't 1980)).

55. *Aboutaam*, 2019 N.Y. Slip Op. 30747(U), at 26.

56. *Id.* at 20 (citing N.Y. CIV. RIGHTS LAW § 74 (McKinney 2019)).

57. *Id.* at 40.

58. 169 A.D. 3d 954, 956, 94 N.Y.S.3d 314, 317 (2d Dep't 2019) (first citing *Silverman v. Daily News, L.P.*, 129 A.D.3d 1054, 1055, 11 N.Y.S.3d 674, 675–76 (2d Dep't 2015); then citing *Stepanov*, 120 A.D.3d 28, 34, 987 N.Y.S.2d 37, 42 (1st Dep't 2014)).

required for the judge, Bernadette Bayne, while her husband, Bernard Udell, a lawyer, could not prove that the statements were published with gross irresponsibility.⁵⁹

The court reiterated the prima facie elements of a defamation case: (1) a false statement of fact that exposes the plaintiff to public contempt, ridicule or disgrace; (2) publication to a third party; (3) fault, with the standard contingent on the plaintiff's status; and (4) special harm or damages.⁶⁰

First, the allegations published by the newspaper about the plaintiffs' misuse of a parking space at the Queens County Courthouse was a "legitimate" matter of public concern, which would at the very least trigger a heightened standard of proof under the gross irresponsibility standard.⁶¹

Second, the newspaper invoked the truth defense, which in New York provides an absolute defense to a defamation claim.⁶² Truth provides immunities even where a substantially true statement contains minor inaccuracies, no matter how "vituperative or unreasonable" it may be.⁶³

Third, a critical quote in the article by an unnamed source, alleging that the plaintiffs' misuse of the parking spot put corrections officers at risk when they moved prisoners, was substantially opinion, also immune from liability.⁶⁴ "The article, read as a whole, is based upon nonactionable substantially true statements and statements of opinion," the court held.⁶⁵

VII. FAIR AND ACCURATE REPORT

News reports based on testimony in a divorce proceeding were fair and accurate reports and thus privileged, the Second Circuit held in

59. *Id.* at 955–56, 94 N.Y.S.3d at 316 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 284 (1964)).

60. *Id.* at 955, 94 N.Y.S.3d at 316 (quoting *Stone v. Bloomberg L.P.*, 163 A.D.3d 1028, 1029, 83 N.Y.S.3d 78, 80 (2d Dep't 2018)).

61. *Id.* at 955–56, 94 N.Y.S.3d at 316 (quoting *Stone*, 163 A.D.3d at 1029, 83 N.Y.S.3d at 80).

62. *Id.* at 956, 94 N.Y.S.3d at 316.

63. *Udell*, 169 A.D.3d at 956, 94 N.Y.S.3d at 317 (first citing *Love v. William Morrow & Co.*, 193 A.D.2d 586, 587, 597 N.Y.S.2d 424, 426 (2d Dep't 1993); then citing *Greenberg v. Spitzer*, 155 A.D.3d 27, 42, 62 N.Y.S.3d 372, 384 (2d Dep't 2017)).

64. *Id.* at 956–57, 94 N.Y.S.3d at 317 (first citing *Silverman v. Daily News, L.P.*, 129 A.D.3d 1054, 1055, 11 N.Y.S.3d 674, 676 (2d Dep't 2015); then citing *Kamalian v. Reader's Digest Ass'n*, 29 A.D.3d 527, 528, 814 N.Y.S.2d 261, 263 (2d Dep't 2006)).

65. *Id.* at 957, 94 N.Y.S.3d at 317 (first citing *Silverman*, 129 A.D.3d at 1055, 11 N.Y.S.3d at 676; then citing *Stepanov v. Dow Jones & Co.*, 120 A.D.3d 28, 37–38, 987 N.Y.S.2d 37, 44 (1st Dep't 2014)).

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*Zappin v. NYP Holdings Inc.*⁶⁶ The plaintiff sued the *New York Post* for defamation after the newspaper published an article about his divorce, including allegations that he was abusive, controlling and had left or been fired from jobs.⁶⁷

The district court dismissed his complaint as well as a similar complaint filed against another newspaper.⁶⁸

Because the reporting was based on proceedings in matrimonial court, the critical question was whether the statutory privilege of the fair and accurate report under New York Civil Rights Law section 74 applied.⁶⁹ The question was ripe because in *Shiles v. News Syndicate Co.*, the New York Court of Appeals had not applied the privilege to documents related to matrimonial proceedings because they are sealed by the court.⁷⁰

The fair and accurate report privilege shields reporters from liability for defamation when information is drawn from public records, government meetings, and court proceedings.⁷¹ This protects “substantially true” reports but also provides some immunity even for “minor inaccuracies.”⁷²

“Given that the reporters were permitted to attend the court hearing and the matrimonial judge did not ban the public from the courtroom, *Shiles* does not bar the defendants from asserting a privilege under § 74,” the court wrote.⁷³

In a similar case, *Gillings v. New York Post*, involving a different plaintiff but the same newspaper and reporter, the Appellate Division affirmed dismissal of a libel case under § 74.⁷⁴ Statements about the plaintiff’s mail fraud conviction relating to his penny stock firm surfaced

66. 769 Fed. Appx. 5, 7 (2d Cir. 2019).

67. *Id.* at 7, 9–10.

68. *Id.* at 7; *see also* *Zappin v. Daily News, L.P.*, 2017 U.S. Dist. LEXIS 125959, at *38 (S.D.N.Y. Aug. 9, 2017).

69. *Zappin*, 769 Fed. Appx., at 8 (“[A] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding”) (quoting N.Y. CIV. RIGHTS LAW § 74 (McKinney 2019)).

70. *See* 27 N.Y.2d 9, 16, 22, 261 N.E.2d 251, 254, 258, 313 N.Y.S.2d 104, 109, 114 (1970).

71. *Zappin*, 769 Fed. Appx., at 8; *see Shiles*, 27 N.Y.2d at 18, 261 N.E.2d at 256, 313 N.Y.S.2d at 110.

72. *Zappin*, 769 Fed. Appx., at 10 (quoting *Shulman v. Hunderfund*, 12 N.Y.3d 143, 150, 905 N.E.2d 1159, 1163, 878 N.Y.S.2d 230, 234 (2009)).

73. *Id.* at 8.

74. 166 A.D.3d 584, 587, 87 N.Y.S.3d 220, 223 (2d Dep’t 2018) (first citing *Saleh v. New York Post*, 78 A.D.3d 1149, 1152 (2d Dep’t 2010); then citing *Holy Spirit Ass’n for Unification of World Christianity v. New York Times Co.*, 49 N.Y.2d 63, 67–68, 399 N.E.2d 1185, 1187, 424 N.Y.S.2d 165, 167–68 (1979)).

during his divorce proceedings, leading the reporter to compare the facts to the movie, the Boiler Room.⁷⁵ The court noted the privilege under section 74 is absolute “and is not defeated by the presence of malice or bad faith.”⁷⁶ The court wrote:

Here, the subject newspaper article explicitly stated that it was describing the divorce action commenced against the plaintiff by his former wife. Furthermore, the defendants’ documentary evidence established, as a matter of law, that the disputed language in the newspaper article was a “fair and true” report of the factual findings made in the divorce action.⁷⁷

A *BuzzFeed* article linking to and based on a controversial foreign intelligence document was considered a government record, the appellate division affirmed in *Fridman v. BuzzFeed, Inc.*⁷⁸ The court wrote:

[A]n ordinary reader of the publications at issue here, a BuzzFeed article, which hyperlinked a CNN article and the embedded dossier compiled by Christopher Steele, which included a confidential report containing the alleged defamatory statements about plaintiffs, would have concluded that there were official proceedings, such as classified briefings and/or an FBI investigation concerning the dossier as a whole, including the confidential report relating to plaintiffs.⁷⁹

VIII. GROSS IRRESPONSIBILITY

A television station’s inaccuracies about a dentist’s license suspension did not amount to gross irresponsibility under the law, the appellate division ruled in *Reddy v. WSYR NewsChannel 9*.⁸⁰ The plaintiff was the subject of a report about her suspension to practice endodontics and oral surgery which was mistakenly described as a suspension to practice dentistry altogether.⁸¹

The misidentification of a teacher accused of bullying a student was not broadcast with gross irresponsibility, a trial court ruled in *Rainbow v.*

75. *Id.* at 585, 87 N.Y.S.3d at 222.

76. *Id.* at 586, 87 N.Y.S.3d at 223 (quoting *Glendora v. Gannett Suburban Newspapers*, 201 A.D.2d 620, 620, 608 N.Y.S.2d 239, 241 (2d Dep’t 1994)).

77. *Id.* at 587, 87 N.Y.S.3d at 223 (quoting *Holy Spirit Ass’n*, 49 N.Y.2d at 67, 399 N.E.2d at 1187, 424 N.Y.S.2d at 167 (1979); then citing *Saleh*, 78 A.D. 3d at 1152; and then citing *Cholowsky v. Civiletti*, 69 A.D.3d 110, 115, 887 N.Y.S.2d 592, 596 (2d Dep’t 2009)).

78. 172 A.D.3d 441, 441–42, 97 N.Y.S.3d 476, 476–77 (1st Dep’t 2019). For a more expansive discussion of the facts, see Roy S. Gutterman, *Media Law*, 68 SYRACUSE L. REV. 1011 (2018).

79. *Fridman*, 172 A.D.3d at 442, 97 N.Y.S.3d at 477.

80. 166 A.D.3d 1517, 1518, 85 N.Y.S.3d 809, 809 (4th Dep’t 2018) (quoting *Elibol v. Berkshire-Hathaway, Inc.*, 298 A.D.2d 944, 945, 747 N.Y.S.2d 649, 651 (4th Dep’t 2002)).

81. *Id.* at 1517, 85 N.Y.S.3d at 809.

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*WPIX, Inc.*⁸² The plaintiff, Starlight Rainbow, was misidentified as a teacher accused of bullying a twelve-year-old girl by a long-time New York City reporter, Magee Hickey.⁸³ The actual teacher was later identified by sources, including the New York City Department of Education (DOE), as Cynthia Rainbow.⁸⁴

The summary judgment dismissal was based on detailed testimony of the reporter's efforts to confirm the allegation of abuse that was based on statements by the victim's mother, a community activist, and a press release issued by that activist naming the abuser as Rainbow.⁸⁵ The reporter further attempted to corroborate allegations through the public information office at the DOE, but officials there did not respond before the story could be broadcast.⁸⁶

The plaintiff argued that this misidentification amounted to libel per se because it would damage her reputation as a teacher.⁸⁷ The court wrote:

Here, there is no dispute that the subject article inaccurately reported the first name of the bullying teacher as "Starlight"—rather than "Cynthia" as Defendants' competitors accurately reported. There also appears to be no dispute that the publication would constitute defamation per se as it would presumably injure Plaintiff in her profession as a teacher.⁸⁸

Nevertheless, the court held that the report was not broadcast with gross irresponsibility, delving into the mechanics of the reporter's newsgathering and attempts to confirm the potentially damaging allegations.⁸⁹ Because the reporter relied on the mother's identification, it was presumed that the source would know the proper name of the teacher.⁹⁰ The same rationale applied to the reporter's reliance on the press release and comments made by the community activist.⁹¹

82. No. 152477/2015, 2018 N.Y. Slip Op. 32692(U), at 9 (Sup. Ct. N.Y. Cty. Oct. 18, 2018).

83. *Id.* at 2.

84. *Id.*

85. *Id.* at 3, 9.

86. *Id.* at 10.

87. *Rainbow*, 2018 N.Y. Slip Op. 32692(U), at 7. The four categories of statements that fall within the scope of defamation per se include: "(1) statements charging plaintiff with a serious crime; (2) statements that tend to injure plaintiff in her trade, business or profession; (3) statements that plaintiff has a loathsome disease; or (4) imputing unchastity to a woman." *Id.* at 7 (quoting *Harris v. Hirsh*, 228 A.D.2d 206, 208, 643 N.Y.S.2d 556, 559 (1st Dep't 1996)).

88. *Id.*

89. *Id.* at 9–10.

90. *Id.* at 9.

91. *Rainbow*, 2018 N.Y. Slip Op. 32692(U), at 3.

The reporter's efforts to confirm the identity of the bullying teacher included talking to other parents outside the school, until the reporter and her cameraman were told to leave by school security, and going through normal administrative channels with the education department's public relations officials, who refused to provide comments either on the record or off the record before broadcast.⁹²

The court wrote that the report was not made with gross irresponsibility because the broadcaster had no reason to question the reporter's findings when it published and broadcast the inaccurate story.⁹³ The court wrote:

[I]t was not grossly irresponsible for Hickey to assume that Ms. Simpson had given her the correct name of the teacher bullying her daughter, when Ms. Simpson had arranged for a press conference for the purpose of shaming the DOE and the mayor into taking measures to protect her daughter. ⁹⁴

Further, the court wrote, "Based on the evidence presented, there was never any reason for Hickey to suspect that she had been given the wrong name of the accused bullying teacher, and as such, there was no reason for her to investigate this fact further."⁹⁵

A television news report about a landlord-tenant rent dispute did not meet the standard of gross irresponsibility for defamation in *Gallipoli v. Nicoletti*.⁹⁶ A report about a landlord posting a sign on her house that the plaintiff had not paid rent in more than three months was broadcast on New York's WPIX and posted on the channel's website in 2013.⁹⁷ As a television news broadcast, the suit was properly vested in libel law, as opposed to slander.⁹⁸

However, the plaintiff was unable to prove that the reporter and broadcaster acted in a grossly irresponsible manner in publishing false, harmful information about him.⁹⁹ The news report was based on interviews and substantially true information about a matter of public

92. *Id.* at 3–4.

93. *Id.* at 10 (citing *Love v. William Morrow & Co.*, 193 A.D.2d 586, 589, 597 N.Y.S.2d 424, 427 (2d Dep't 1993)).

94. *Id.* at 9.

95. *Id.* (citing *Gaeta v. New York News, Inc.*, 62 N.Y.2d 340, 351, 465 N.E.2d 802, 806–07, 477 N.Y.S.2d 82, 86–87 (1984)).

96. No. 507893/2013, 2018 N.Y. Slip Op. 33073(U), at 7 (Sup. Ct. Kings Cty. Nov. 28, 2018).

97. *Id.* at 1–2.

98. *Id.* at 4 (citing *Matherson v. Marchello*, 100 A.D.2d 233, 239–40, 473 N.Y.S.2d 998, 1004 (2d Dep't 1984)).

99. *Id.* at 7 (citing *Gaeta*, 62 N.Y.2d at 350–51, 465 N.E.2d at 806, 477 N.Y.S.2d at 86).

interest.¹⁰⁰ New York requires plaintiffs in libel suits to prove that publication was made with gross irresponsibility, a standard which indemnifies media defendants who must employ “reasonable” verification techniques in matters of public interest.¹⁰¹

“Courts, in determining whether a story involves a matter of public concern, absent clear abuse, give broad deference to editorial judgments ‘so long as a published report can be fairly considered as relating to any matter of political, social, or other concern of the community,’” the court wrote.¹⁰²

The court added that there was no evidence that either the reporter or the broadcaster should have “doubt[ed] the veracity” of the landlord sources.¹⁰³ In addition to granting summary judgment on the defamation claims, the court also dismissed claims for intentional infliction of emotional distress and negligent infliction of emotional distress.¹⁰⁴

IX. STATUTE OF LIMITATIONS

A hypertext link to a magazine’s archived articles and access to an article would not constitute new publication for litigation purposes, the Appellate Division ruled in *Biro v. Conde Nast*.¹⁰⁵ The one-year statute of limitations was not renewed or extended as a republication or new

100. *Id.* at 5 (citing *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975)).

101. *See generally Gallipoli*, 2018 N.Y. Slip Op. 33073(U) (outlining the “gross irresponsibility” standard).

102. *Id.* at 5–6 (quoting *Huggins v. Moore*, 94 N.Y. 2d 296, 303, 726 N.E.2d 456, 460, 704 N.Y.S.2d 904, 908 (1999)).

103. *Id.* at 6 (first citing *Gaeta*, 62 N.Y.2d at 351, 465 N.E.2d at 806–07, 477 N.Y.S.2d at 86–87; then citing *Pollnow v. Poughkeepsie Newspapers, Inc.*, 107 A.D.2d 10, 17, 486 N.Y.S.2d 11, 17 (2d Dep’t 1985); then citing *Robart v. Post-Standard*, 74 A.D.2d 963, 963, 425 N.Y.S.2d 891, 892 (3d Dep’t 1980), *aff’d*, 52 N.Y.2d 843, 418 N.E.2d 664, 437 N.Y.S.2d 71 (1984); and then citing *Campo Lindo for Dogs, Inc. v. New York Post Corp.*, 65 A.D.2d 650, 650, 409 N.Y.S.2d 453, 454 (3d Dep’t 1978)).

104. *Id.* at 7–8 (first citing *Matthaus v. Hadjedj*, 148 A.D.3d 425, 425, 49 N.Y.S.3d 393, 394 (1st Dep’t 2000); then citing *Segall v. Sanders*, 129 A.D.3d 819, 821, 11 N.Y.S.3d 235, 237 (2d Dep’t 2015); then citing *Hirschfeld v. Daily News, L.P.*, 269 A.D.2d 248, 249, 703 N.Y.S.2d 123, 124 (1st Dep’t 2000); then citing *Chaiken v. VV Publ’g Corp.*, 119 F.3d 1018, 1034–35 (2d Cir. 1997); and then citing *Howell v. New York Post Co.*, 81 N.Y.2d 115, 125, 612 N.E.2d 699, 704–05, 596 N.Y.S.2d 350, 355–56 (1993)).

105. 171 A.D.3d 463, 464, 95 N.Y.S.3d 799, 799 (1st Dep’t 2019) (citing *Martin v. Daily News L.P.*, 121 A.D.3d 90, 103–04, 990 N.Y.S.2d 473, 483–84 (1st Dep’t 2014)). Details of this prolonged libel suit had been covered in previous *Survey* articles. *See Roy S. Gutterman, Media Law*, 68 SYRACUSE L. REV. 1011, 1132 (2017); *see also Roy S. Gutterman, Media Law*, 67 SYRACUSE L. REV. 1075, 1080 (2016).

publication because an article was accessible or accessed through online databases or archives.¹⁰⁶

“The article was unmodified and had been continuously archived on the same website since the printed version was first published A reference to an article that does not restate the defamatory material is not a republication of the material,” the court ruled.¹⁰⁷

X. DISCOVERY

A Supreme Court judge ordered the defendant to pay half the proposed costs associated with discovery in a complicated and prolonged defamation case by a former insurance company executive against Eliot Spitzer, the former governor and attorney general of New York in *Greenberg v. Spitzer*.¹⁰⁸ The defamation claim arose in 2013 after Spitzer published a book, *Protecting Capitalism Case by Case*, which included allegations accusing the plaintiff of illegal conduct which was investigated during Spitzer’s term as attorney general.¹⁰⁹

Under the “broad mandate” of CPLR 3101, the plaintiff produced 47 million pages of documents, which under statutory law, could have cost between \$11 million dollars to \$32 million dollars, lawyers estimated.¹¹⁰ The plaintiff’s lawyers whittled down estimated to \$265,454.57, calculating the rate at \$.005 per page.¹¹¹

The court ruled that the defendant should cover half the cost of production, or \$132,727.29, because of the unforeseen expenses.¹¹² The court commented on the complexity of the case: “[W]hile the parties’ dispute has taken on the appearance of an episode of Game of Thrones, to each of them, there is much at stake.”¹¹³

106. *Id.* at 464, 95 N.Y.S.3d at 800 (first citing N.Y. C.P.L.R. 215[3] (McKinney 2019); then citing *Gregoire v. G. P. Putnam’s Sons*, 298 N.Y. 119, 123, 81 N.E.2d 45, 47 (1948); and then citing *Firth v. State*, 98 N.Y.2d 365, 370, 775 N.E.2d 463, 465–66, 747 N.Y.S.2d 69, 71–72 (2002)).

107. *Id.* at 464, 95 N.Y.S.3d at 799–800 (citing *Klein v. Biben*, 296 N.Y. 638, 69 N.E.2d 682 (1946)).

108. 63 Misc. 3d 554, 563, 94 N.Y.S.3d 810, 817 (Sup. Ct. Putnam Cty. 2019) (first citing N.Y. C.P.L.R. 8301 (McKinney 2019); then citing *Vinings Spinal Diagnostic v. Progressive Cas. Ins.*, 15 Misc. 3d 270, 273, 829 N.Y.S.2d 871, 873 (Dist. Ct. Nassau Cty. 2006)).

109. *Id.* at 555, 94 N.Y.S.3d at 811.

110. *Id.* at 559–60, 94 N.Y.S.3d at 814–15 (first citing N.Y. PUB. OFF. LAW § 87(1)(c) (McKinney 2019), then citing N.Y. PUB. HEALTH LAW § 18(2)(e) (McKinney 2019)).

111. *Id.* at 560, 94 N.Y.S.3d at 815.

112. *Id.* at 563, 94 N.Y.S.3d at 817 (first citing N.Y. C.P.L.R. 8301; then citing *Vinings*, 15 Misc. 3d at 273, 829 N.Y.S.2d at 873).

113. *Greenberg*, 63 Misc. 3d at 562, 94 N.Y.S.3d at 817.

XI. INVASION OF PRIVACY

A. *Appropriation of Images*

A default judgment was entered on behalf of a group of five models whose images were used without their consent on promotional materials for a New York strip club in *Mayes v. 490 Habitat, Inc.*¹¹⁴ The defendant, which operated The Oasis Gentlemen’s Club, had used images of the professional models on advertisements giving rise to a multiple-count complaint based on deceptive trade practices and false endorsement under the Lanham Act,¹¹⁵ violation of New York’s deceptive trade practices law,¹¹⁶ and misappropriation of an image or likeness under New York’s invasion of privacy statute.¹¹⁷

The plaintiff secured a default and default judgment because the defendant business failed to respond, appear in court, or otherwise mount a defense.¹¹⁸ In a footnote, the magistrate’s report stated, “If the allegations in the complaint suffice to establish liability, the court then conducts an inquiry to determine the amount of damages to a ‘reasonable certainty.’”¹¹⁹

On the claims under the Lanham Act, the magistrate applied four prongs determined in a similar recent case, *Toth v. 59 Murray Entertainment, Inc.*, holding the plaintiffs established liability for false endorsement based on the statute’s four prongs: (1) a use in commerce; (2) making a false or misleading factual impression; (3) used in connection with goods or services; and (4) causing consumer confusion “as to the origin, sponsorship, or approval of the goods or services.”¹²⁰

The default, the court held, was an accepted admission, which “defendant effectively admits all of the underlying facts which leads to

114. No. 18-CV-1427 (SJM) (GRB), 2019 U.S. Dist. LEXIS 35270, at *20 (E.D.N.Y. Mar. 4, 2019).

115. *Id.* at *6 (citing 15 U.S.C. § 1125 (2012)).

116. *Id.* at *8 (citing N.Y. GEN. BUS. LAW § 349 (McKinney 2019)).

117. *Id.* at *9 (citing N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2019)).

118. *Id.* at *2–3. An additional defendant, the purported owner of the defendant business, was not properly served, prompting the court to vacate default against him. *See Mayes*, 2019 U.S. Dist. LEXIS 35270, at *20–21.

119. *Id.* at *4 n.4 (first quoting *Bounty Fresh, LLC v. J.N.Y. Produce, Inc.*, No. 12-CV-2415 (FB) (JO), 2014 U.S. Dist. LEXIS 33834, at *2 (E.D.N.Y. Mar. 14, 2014); then citing *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992)).

120. *Id.* at *6 (quoting *Toth v. 59 Murray Enters., Inc.*, No. 15 Civ. 8028 (NRB), 2019 U.S. Dist. LEXIS 1355, at *12–13 (S.D.N.Y. Jan. 3, 2019)).

that conclusion, including the fame, success and recognizability of each plaintiff”¹²¹

The consumer confusion count under New York General Business Law was rejected because the magistrate did not find support after applying the three prongs set forth in Section 349: (1) a consumer-oriented practice; (2) and that practice is misleading in a “material respect;” that (3) injures a non-consumer plaintiff and the public interest.¹²² The third prong, the court held, was not convincing with the plaintiff establishing “nothing more than consumer confusion.”¹²³

The plaintiff’s invasion of privacy claim under New York law was adequately pled and was supported by other similar cases by models who had their images appropriated and used without their consent.¹²⁴ Applying *Molina v. Phoenix Sound, Inc.*, the court found four elements of the statute were satisfied: (1) using plaintiff’s image or likeness; (2) in New York; (3) for advertising or trade purposes; and (4) without written consent of the plaintiff.¹²⁵

Even though the plaintiffs established liability for the bulk of the claims, the magistrate rejected the plaintiffs’ expert’s report on damages, estimated to total \$545,000.¹²⁶ Damages for these causes of action should be actual or compensatory based on reasonable fair market standards and as well as credible evidence or expert analysis.¹²⁷ The court did not find the expert’s predictions or basis for those predictions credible.¹²⁸ The court also rejected the plaintiffs’ demand for injunctive relief because it was not properly pleaded.¹²⁹

121. *Id.* at *7 (citing *Mayes v. Summit Entm’t Corp.*, No. 1:16-CV-06533 (NGG) (ST), 2018 U.S. Dist. LEXIS 8902, at *9 (E.D.N.Y. Jan. 18, 2018)).

122. *Id.* at *8–9 (citing *Mayes v. Summit Entm’t Corp.*, 287 F. Supp. 3d 200, 205 (E.D.N.Y. 2018)).

123. *Mayes*, 2019 U.S. Dist. LEXIS 35270, at *9.

124. *Id.* at *10.

125. *Id.* at *9–10 (quoting *Molina v. Phoenix Sound, Inc.*, 297 A.D.2d 595, 597, 747 N.Y.S.2d 227, 230 (1st Dep’t 2002)).

126. *Id.* at *11–12.

127. *Id.* at *12.

128. *Mayes*, 2019 U.S. Dist. LEXIS 35270, at *17 (“Based on these authorities and the glaring deficiencies in [the expert’s] report—the sole basis for plaintiffs’ claim for damages, plaintiffs have failed to meet their burden of establishing damages. Therefore, the undersigned recommends that no damages be awarded.”).

129. *Id.* at *18.

The magistrate only recommended an award of \$400 for costs.¹³⁰ Weeks later, a federal district court judge rejected the plaintiffs' objections and accepted the magistrate's report and findings.¹³¹

The plaintiffs in this case filed a similar complaint based on similar allegations of unauthorized use of their images on promotional materials by a different "gentlemen's" club in *Van Derham v. Bullseye Restaurant*, prompting the defendant to seek a declaratory judgment in a dispute over indemnification by its insurance company.¹³² The use of their images in online social media promotions created the misimpression that the models either performed at the club defendant operated known as "The Scene," or otherwise endorsed the club.¹³³

This case involved a third-party complaint against the production company contracted to create Bullseye's promotional, advertising, and social media campaigns on sites including Facebook.¹³⁴ The bulk of the discussion on the insurance coverage focused on interpreting the contractual terms and the dates of the coverage.¹³⁵ The court held the insurer, James River Insurance Company, was not liable for coverage for some of the claims.¹³⁶

In *Toth v. 59 Murray Enterprises*, a group of models sued a group of strip clubs for unauthorized use of their images in promotional materials, advertisements, social media and websites.¹³⁷ The lead plaintiff, the famous model/actress/singer Carmen Electra, prevailed in her summary judgment motion for false endorsement under the Lanham Act, misappropriation of image and likeness under New York law.¹³⁸ The other ten plaintiffs, however, had their motions for summary judgment denied because they were not famous or identifiable enough to support their claims, the court held.¹³⁹

Though unauthorized use of the plaintiffs' images and likenesses for promotional purposes was undisputed, defendants' summary judgment motion was supported by both the statute of limitations and the fact that

130. *Id.* at *20.

131. *See* *Mayes v. 490 Habitat, Inc.*, No. 18-CV-1427 (SJF) (GRB), 2019 U.S. Dist. LEXIS 54489, at *1 (E.D.N.Y. Mar. 29, 2019).

132. *See* *Bullseye Rest., Inc. v. James River Ins.*, 387 F. Supp. 3d 273, 275 (E.D.N.Y. 2019).

133. *Id.* at 276.

134. *Id.* at 277.

135. *Id.* at 280–81.

136. *Id.* at 286.

137. No. 15 Civ. 8028 (NRB), 2019 U.S. Dist. LEXIS 1355, at *2 (S.D.N.Y. Jan. 3, 2019).

138. *Id.* at *40.

139. *Id.* at *18–19.

ten of the plaintiffs had signed “unlimited” releases with photographers relinquishing their future rights.¹⁴⁰ The claims under New York Civil Rights Law sections 50–51, though satisfying the substantive elements that the plaintiffs’ images were used for commercial or advertising purposes without their consent, and largely acknowledged, by the defendants, the one-year statute of limitations barred most of their claims.¹⁴¹

Furthermore, the far-reaching, “comprehensive” and “crystal clear” releases the plaintiffs signed years earlier with photographers, signed away their rights.¹⁴²

“Thus, they expressly disclaimed their right to pursue claims relating to these images and gave releasees the authority to allow third-parties like the Clubs to use their images in any form and for any purpose whatsoever, without limitation.”¹⁴³

The most comprehensive analysis in this case, though, involved Electra’s successful claims, particularly her claims under the Lanham Act for false endorsement, false or misleading representation of fact, and likelihood of consumer confusion.¹⁴⁴ The court went through the six-points set forth in *Polaroid Corp. v. Polarad Electronics Corp.*¹⁴⁵ These factors are: (1) strength of the trademark; (2) evidence of actual consumer confusion; (3) evidence of bad faith; (4) similarity of the marks; (5) proximity of the products and competitiveness; and (6) sophistication of consumers in the market.¹⁴⁶

Because of Electra’s fame and identifiability of her image and likeness, her Lanham Act claims were upheld, though the other ten models were not:

[T]he remaining ten plaintiffs have failed to adduce evidence of a strong mark. Unlike plaintiff Electra, none of these other plaintiffs offered evidence of significant income earned through their various appearances. And while these other plaintiffs have participated in promotional campaigns for a wide variety of brands and appeared in magazines, TV shows, and movies, their resumes are devoid of evidence that they actually garnered recognition for any of their appearances. Simply listing brands or magazine titles is insufficient The bottom line is that regardless of the plaintiffs’ presence on

140. *Id.* at *8.

141. *Id.* at *28–29.

142. *Toth*, 2019 U.S. Dist. LEXIS 1355, at *29–30.

143. *Id.* at *30.

144. *Id.* at *12–15 (citing Lanham Act § 43, 15 U.S.C. § 1125(a)(1) (2012)).

145. *Id.* at *15 (citing 287 F.2d 492, 495 (2d Cir. 1961)).

146. *Id.* (citing *Polaroid*, 287 F.2d at 495).

social media, they have failed to cite even one example of actual recognition.¹⁴⁷

Because Electra could establish the likelihood of consumer confusion, her injunction was also granted.¹⁴⁸

B. Video Games

A professional basketball entertainer who uses the nicknames “Hot Sizzle” and “Hot Sauce” had his unlawful appropriation suit against a video game company dismissed by a state trial court in *Champion v. Take Two Interactive Software, Inc.*¹⁴⁹ The dismissal follows dismissal of two similarly-grounded cases covered in last year’s *Survey* establishing a high bar to hold video game designers and manufacturers liable for misappropriation of an image or likeness for commercial purposes.¹⁵⁰ These cases are especially difficult given courts’ findings that modern video games are protected under the First Amendment as narrative, artistic, or even satirical content.¹⁵¹

This latest litigation involves defendant’s latest release, NBA2K18, an interactive NBA video game that allows players to play as avatars of real professional basketball players as well as navigate several story lines.¹⁵² The game features “playable” and “non-playable characters.”¹⁵³ Plaintiff contended that one of the non-playable characters, an African-American male with a Mohawk hairdo and a black and white uniform bearing the name “Hot Sizzles,” used his nickname and bore a resemblance to him.¹⁵⁴

Under sections 50–51, there were two critical questions: did the avatar in the video game use plaintiff’s image or likeness because of the visual appearance and the use of the term “Hot Sizzles” and whether the use was commercial or in advertising.¹⁵⁵ The finding can be both a matter of fact for a jury or a pre-trial matter of law for a judge to dismiss.¹⁵⁶

147. *Toth*, 2019 U.S. Dist. LEXIS 1355, at *18–19 (citing *Pelton v. Rexall Sundown, Inc.*, No. 99 Civ. 4342 (JSM), 2001 U.S. Dist. LEXIS 3825, *10 (S.D.N.Y. Apr. 4, 2001)).

148. *Id.* at *26.

149. 64 Misc. 3d 530, 541, 100 N.Y.S.3d 838, 848 (Sup. Ct. N.Y. Cty. 2019).

150. Roy S. Gutterman, *Media Law*, 69 SYRACUSE L. REV. 1000, 1026 (2019).

151. *See Champion*, 64 Misc. 3d at 540, 100 N.Y.S.3d at 847 (citing U.S. CONST. amend. I); *see also* *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011).

152. *See Champion*, 64 Misc. 3d at 532, 100 N.Y.S.3d at 841.

153. *Id.*

154. *Id.* at 533, 100 N.Y.S.3d at 842.

155. *Id.* at 536, 100 N.Y.S.3d at 844.

156. *Id.* at 537, 100 N.Y.S.3d at 845 (citing *Cohen v. Herbal Concepts*, 63 N.Y.2d 379, 384, 472 N.E.2d 307, 309, 482 N.Y.S.2d 457, 459 (1984)).

The court noted that the character in the game was peripheral but the plaintiff was not a recognizable public figure or celebrity who could adequately be mistaken for the character in the game and: “Absent any tenable connection or claim to Plaintiff being recognizably known as ‘Hot Sizzle,’ naming the avatar similarly also does not aid in the visual recognition of it as Plaintiff.”¹⁵⁷

XII. OTHER TORTS

Despite publishing potentially defamatory and highly offensive postings about a law professor, an injunction aimed at prohibiting a website from continuously posting these comments should have been dismissed, the appellate division ruled in *Brummer v. Wey*.¹⁵⁸ After rendering an opinion on the Financial Industry Regulatory Authority, plaintiff became the subject of racist, hateful, and potentially defamatory statements published on The Blot, a tabloid-style website that covers the financial regulatory industry.¹⁵⁹

Among the offensive content was images juxtaposing plaintiff’s likeness to graphic images of lynchings, which plaintiff interpreted as threatening violence against him or publishing a “true threat.”¹⁶⁰

The court, however, was not receptive to the trial court’s injunction or court order preliminarily enjoining the website from publishing or posting the content, because it was an unconstitutional prior restraint.¹⁶¹

The court noted that prior restraints or censorship of speech require exacting analysis under the First Amendment, and “[T]he speech at issue in this case—although highly offensive, repulsive and inflammatory—does not meet this exacting constitutional standard. Accordingly, the injunction under review must be vacated.”¹⁶²

Analyzing the offensive speech under the lens of a true threat, the court was equally not convinced that a prior restraint would have been constitutional because the underlying speech could not reasonably be viewed as “truly threatening or inciting violence against plaintiff.”¹⁶³

The court wrote:

157. *Champion*, 64 Misc. 3d at 540, 100 N.Y.S.3d at 847.

158. 166 A.D.3d 475, 475, 89 N.Y.S.3d 11, 12 (1st Dep’t 2018).

159. *Id.* at 476, 89 N.Y.S.3d at 13.

160. *Id.* at 476–77, 89 N.Y.S.3d at 13.

161. *Id.* at 475–76, 89 N.Y.S.3d at 12 (first quoting *Ash v. Bd. of Managers of the 155 Condo.*, 44 A.D.3d 324, 324, 843 N.Y.S.2d 218, 219 (1st Dep’t 2007), then citing *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976)).

162. *Id.* at 476, 89 N.Y.S.3d at 13.

163. *Brummer*, 166 A.D.3d at 477, 89 N.Y.S.3d at 14.

While this analogy is incendiary and highly inappropriate, plaintiff has not established that any reasonable viewer would have understood the posts as threatening or calling for violence against him. Moreover, even if the posts could reasonably be construed as advocating unlawful conduct, plaintiff has not established that any “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁶⁴

XIII. NEWSGATHERING

A. Access

A trial court properly sealed the pre-trial papers and record in a felonious sexual misconduct prosecution of a high profile entertainment executive, the appellate division ruled in *Matter of New York Times Co. v. Burke*.¹⁶⁵ Balancing First Amendment access to court proceedings with the need to ensure a fair trial, the court held that sealing and closure here was appropriate.¹⁶⁶

The subject matter of the *Molineux/Sandoval* hearing—allegations of prior uncharged sexual offenses by the defendant, the admissibility of which is disputed—was likely to be prejudicial and inflammatory. Further, some or all of the allegations may have been determined to be inadmissible at trial, or may not be offered at trial even if found potentially admissible Given the worldwide media scrutiny this case has received, the motion court reasonably concluded that the sealing of documents relating to this single pretrial hearing was the only way to prevent tainting the jury pool with such inadmissible, prejudicial information.¹⁶⁷

164. *Id.* at 478, 89 N.Y.S.3d at 14 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

165. 172 A.D.3d 541, 541, 101 N.Y.S.3d 294, 295 (1st Dep’t 2019).

166. *Id.* at 541–42, 101 N.Y.S.3d at 295–96 (first citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980); then citing *Press-Enter. Co. v. Superior Court of California*, 464 U.S. 501, 509–10 (1984)).

167. *Id.* at 542, 101 N.Y.S.3d at 296 (citing *Gannett Co. v. De Pasquale*, 43 N.Y.2d 370, 379, 372 N.E.2d 544, 549, 401 N.Y.S.2d 756, 761 (1977)).