

NEW YORK'S APPELLATE COURTS WRESTLE WITH
SIGNIFICANT ISSUES IN INTERNET DEFAMATION CASES

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I. INTRODUCTION

In 1999 and 2002, the New York Court of Appeals was presented with its first internet defamation cases, *Lunney v. Prodigy Services Co.*,¹ and *Firth v. State*.² In *Lunney*, the court held, *inter alia*, that

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This article is dedicated to former Court of Appeals Judges Carmen Beauchamp Ciparick, who retired from on December 31, 2012 pursuant to the State’s mandatory retirement law, and Theodore T. Jones, Jr., who passed away suddenly of an apparent heart attack on November 5, 2012 while serving on the court. Both judges will be greatly missed.

¹ *Lunney v. Prodigy Servs. Co.*, 94 N.Y.2d 242, 723 N.E.2d 539, 701 N.Y.S.2d 684 (1999).

² *Firth v. State*, 98 N.Y.2d 365, 775 N.E.2d 463, 747 N.Y.S.2d 69 (2002).

an internet service provider (“ISP”) is not a “publisher” for defamation purposes of email and internet bulletin board messages sent on its server.³ The court described *Firth* as “the first occasion for us to determine how our defamation jurisprudence, developed in connection with traditional mass media communications, applies to communications in a new medium—cyberspace—in the modern Information Age.”⁴ In a nationally significant landmark ruling, the court held that one of the traditional defamation principles of law—the “single publication rule” for purposes of determining the accrual of the one year statute of limitations—applies to internet defamation cases.⁵ These two cases were a clear signal that the Court of Appeals would likely apply traditional defamation rules to internet defamation.

In the more than ten years since *Lunney* and *Firth* were decided, New York’s appellate courts have addressed several traditional defamation issues as well as “internet specific” issues in the context of the ever-increasing internet publication world in which we live.⁶ This article will address some of these issues, including long-arm jurisdiction, pre-action disclosure to determine the identity of the often anonymous publisher of the allegedly defamatory statements, and application of a new federal statute, the Communications Decency Act.⁷ Before doing so, however, we will set the stage by briefly addressing *Lunney* and *Firth* to see how this all started and to provide context for how the application of traditional defamation rules has played out as New York’s appellate courts have wrestled with internet defamation cases.

II. THE BEGINNING OF THE INTERNET DEFAMATION AGE IN NEW YORK—*LUNNEY* AND *FIRTH*

A. *Lunney v. Prodigy Services Co.*

The facts in *Lunney* are not at all like a typical, traditional

³ See *Lunney*, 94 N.Y.2d at 250–51, 723 N.E.2d at 542, 701 N.Y.S.2d at 687.

⁴ *Firth*, 98 N.Y.2d at 367, 775 N.E.2d at 463, 747 N.Y.S.2d at 69.

⁵ *Id.* at 369, 370, 775 N.E.2d at 464–65, 466, 747 N.Y.S.2d at 70–71, 72.

⁶ The term “electronic publishing” has been defined as “the providing of traditional magazine or book-based materials with computer-aided processes.” Sidney A. Rosenzweig, Comment, *Don't Put My Article Online: Extending Copyright's New-Use Doctrine to the Electronic Publishing Media and Beyond*, 143 U. PA. L. REV. 899, 899 (1995) (citations omitted).

⁷ Communications Decency Act of 1996, Pub. L. 104–104, §§ 501–52, 110 Stat. 56, 133–42 (1996).

defamation case, but are more common in today's internet defamation world. An imposter

[u]surp[ed] the name of Alexander Lunney, a teenage Boy Scout, [and] opened a number of accounts with Prodigy, [an ISP]. The imposter posted two vulgar messages in Lunney's name on a Prodigy bulletin board and sent a threatening, profane . . . e-mail[] message in Lunney's name to a third person. Lunney . . . sued Prodigy, asserting that he has been stigmatized by being falsely cast as the author of these messages. The principal issues [on appeal were] . . . whether, under these circumstances, Prodigy [could] be held liable for defamation or negligence.⁸

The Court of Appeals held that it could not be held liable and affirmed dismissal of the complaint against Prodigy.⁹

One of the emails in "Lunney's name [was sent] to a local scoutmaster. The subject line of the message read 'HOW I'M GONNA'KILL U'; the body [of the email] was vulgar in the extreme."¹⁰ When Lunney learned of the emails and bulletin board messages at issue, he denied authorship and claimed an imposter did this, and Prodigy and local investigators "readily accepted Lunney's denial of authorship and his innocence."¹¹

The court first addressed the "threshold . . . question of whether the messages were defamatory. . . . [D]efamation cases most typically involve communications that directly impugn the plaintiff. Here, the messages were not about the plaintiff, but were ascribed to him."¹² The court noted that in *Ben-Oliel v. Press Publishing Co.*,¹³ it had "held that a scholar stated a cause of action for libel based on the publication of a flawed article written by someone else, but improperly attributed to her."¹⁴ Therefore, the court "assume[d]" for purposes of the case "that although he was not directly attacked, Lunney was defamed by being portrayed as the author of the foul material."¹⁵

⁸ *Lunney*, 94 N.Y.2d at 246, 723 N.E.2d at 539–40, 701 N.Y.S.2d at 684–85.

⁹ *Id.* at 246, 723 N.E.2d 540, 701 N.Y.S.2d at 685.

¹⁰ *Id.* at 247, 723 N.E.2d at 540, 701 N.Y.S.2d at 685.

¹¹ *Id.*

¹² *Id.* at 248, 723 N.E.2d at 540–41, 701 N.Y.S.2d at 685–86.

¹³ *Ben-Oliel v. Press Pub. Co.*, 251 N.Y. 250, 167 N.E. 432 (1929); *see also* *Clevenger v. Baker Voorhis & Co.*, 8 N.Y.2d 187, 168 N.E.2d 643, 203 N.Y.S.2d 812 (1960).

¹⁴ *Lunney*, 94 N.Y.2d at 248, 723 N.E.2d at 541, 701 N.Y.S.2d at 686 (citing *Clevenger*, 8 N.Y.2d at 190, 192, 168 N.E.2d at 645–46, 203 N.Y.S.2d at 815, 816; *Ben-Oliel*, 251 N.Y. at 252–53, 256, 167 N.E. 432–33, 434).

¹⁵ *Id.*

The court then held that “even if the material was ‘defamatory’ Prodigy is protected by the common-law privilege recognized in *Anderson v. New York Tel. Co.*”¹⁶ Turning first to the emails, the court wrote that email:

is the day’s evolutionary hybrid of traditional telephone line communications and regular postal service mail. As one commentator explained, “[t]o transmit a message, one must have access to an on-line service’s e-mail system and must know the recipient’s personal e-mail address.” Once this is accomplished, a person may communicate by composing a message in the e-mail computer system and dispatching it telephonically (or through some other dedicated electronic line) to one or more recipients’ electronic mailboxes. A recipient may forward the message or reply in like manner. Commercial on-line services, such as Prodigy, transmit the private e-mail messages but do not exercise any editorial control over them.¹⁷

The court then evaluated Lunney’s defamation claim “in accordance with our established tort principles” because his action was “grounded in New York common law.”¹⁸ Notably, the court wrote that “[a]lthough they were fashioned long before the advent of e-mail, these settled doctrines accommodate the technology comfortably, and with apt analogies.”¹⁹ In *Anderson*, the court had held that a telephone company could not be “held liable as a publisher of a scurrilous message that a third party recorded and made available to the public by inviting anyone interested to dial in and listen.”²⁰ In *Anderson*, the court adopted that appellate division dissent, which found that the telephone company could not be considered a publisher, because in “no sense has . . . [it] participated in preparing the message, exercised any discretion or control over its communication, or in any way assumed responsibility.”²¹

¹⁶ *Id.* (citing *Anderson v. N.Y. Tel. Co.*, 35 N.Y.2d 746, 748, 320 N.E.2d 647, 647, 361 N.Y.S.2d 913, 913 (1974)).

¹⁷ *Lunney*, 94 N.Y.2d at 248, 723 N.E.2d at 541, 701 N.Y.S.2d at 686 (other citations omitted) (quoting Douglas B. Luftman, Note, *Defamation Liability for On-Line Services: The Sky Is Not Falling*, 65 GEO. WASH. L. REV. 1071, 1081 (1997)).

¹⁸ *Lunney*, 94 N.Y.2d at 248–49, 723 N.E.2d at 541, 701 N.Y.S.2d at 686.

¹⁹ *Id.* at 249, 723 N.E.2d at 541, 701 N.Y.S.2d at 686 (emphasis added) (citing David P. Miranda, *Defamation in Cyberspace: Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 5 ALB. L. J. SCI. & TECH. 229, 237–38 (1996)).

²⁰ *Lunney*, 94 N.Y.2d at 249, 723 N.E.2d at 541, 701 N.Y.S.2d at 686.

²¹ *Id.* (alterations in original) (quoting *Anderson v. N.Y. Tel. Co.*, 42 A.D.2d 151, 163, 345 N.Y.S.2d 740, 752 (App. Div. 4th Dep’t 1973), *aff’d*, 35 N.Y. 746, 320 N.E.2d 647, 361 N.Y.S.2d 913 (1974)).

Moreover, the *Lunney* court noted, “*Anderson* also holds that even if the telephone company could be counted as a publisher, it would be entitled to a qualified privilege subject to the common-law exception for malice or bad faith.”²²

The court then held that “[t]he *Anderson* doctrine parallels the case before us. Prodigy’s role in transmitting e-mail is akin to that of a telephone company, which one neither wants nor expects to superintend the content of its subscribers’ conversations. In this respect, an ISP, like a telephone company, is merely a conduit.”²³ Therefore, with respect to the email, the court held that under the facts of this case, “Prodigy was not a publisher of the e-mail transmitted through its system by a third party.”²⁴ In addition, the court held that Prodigy is entitled to “the common-law qualified privilege accorded to telephone and telegraph companies. The public would not be well served by compelling an ISP to examine and screen millions of e-mail communications, on pain of liability for defamation.”²⁵

However, the court found that “[a]s distinguished from e-mail communication, there are more complicated legal questions associated with electronic bulletin board messages, owing to the generally greater level of cognizance that their operators can have over them.”²⁶ The court compared electronic bulletin boards to traditional media, noting that

In some instances, an electronic bulletin board could be made to resemble a newspaper’s editorial page; in others it may function more like a “chat room.” In many respects, an ISP bulletin board may serve much the same purpose as its ancestral version, but uses electronics in place of plywood and thumbtacks. Some electronic bulletin boards post messages instantly and automatically, others briefly delay posting so as not to become “chat rooms,” while still others significantly delay posting to allow their operators an opportunity to edit the message or refuse posting

²² *Lunney*, 94 N.Y.2d at 249, 723 N.E.2d at 541, 701 N.Y.S.2d at 686 (citing *Anderson*, 42 A.D.2d at 163–64, 345 N.Y.S.2d at 752–53). The court noted that “*Anderson* emphasized the distinction between a telegraph company (in which publication may be said to have occurred through the direct participation of agents) and a telephone company, which, as far as content is concerned, plays only a passive role.” *Lunney*, 94 N.Y.2d at 249, 723 N.E.2d at 541–42, 701 N.Y.S.2d at 686–87 (citing *Anderson*, 42 A.D.2d at 163–64, 345 N.Y.S.2d at 752–53).

²³ *Lunney*, 94 N.Y.2d at 249, 723 N.E.2d at 542, 701 N.Y.S.2d at 687.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 249–50, 723 N.E.2d at 542, 701 N.Y.S.2d at 687.

altogether.²⁷

“Lunney argue[d] that because Prodigy . . . reserves . . . broad editorial discretion to screen its bulletin board messages [in its membership agreements,] it should be liable as a publisher of such messages.”²⁸ On the other hand, Prodigy argued that it was not a publisher of messages posted on its bulletin board because although it reserved this right, it is not required to screen messages, and it does not normally do so.²⁹

The court found that:

[t]he Appellate Division aptly concluded that even if Prodigy “exercised the power to exclude certain vulgarities from the text of certain [bulletin board] messages,” this would not alter its passive character in “the millions of other messages in whose transmission it did not participate” nor would this, in our opinion, compel it to guarantee the content of those myriad messages.³⁰

Thus, the court concluded that “in this case, Prodigy was not a publisher of the electronic bulletin board messages. [It] s[aw] no occasion to hypothesize whether there may be other instances in which the role of an electronic bulletin board operator would qualify it as a publisher.”³¹

Finally, the court rejected Lunney’s attempts to impose liability based on negligence or the Communications Decency Act (“CDA”).³² It found that there was “no justification for such a limitless field of liability” as the negligence rule that Lunney advocated, and that “[t]his case does not call for” the court to retroactively apply the CDA as advocated by Prodigy.³³

²⁷ *Id.* at 250, 723 N.E.2d at 542, 701 N.Y.S.2d at 687 (footnote omitted) (citing David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 152–53 (1997)).

²⁸ *Lunney*, 94 N.Y.2d at 250, 723 N.E.2d at 542, 701 N.Y.S.2d at 687.

²⁹ *Id.*

³⁰ *Id.* (alteration in original) (citing *Lunney v. Prodigy Servs. Co.*, 250 A.D.2d 230, 237, 683 N.Y.S.2d 557, 562 (App. Div. 2d Dep’t 1998), *aff’d*, 94 N.Y.2d 242, 723 N.E.2d 539, 701 N.Y.S.2d 684 (1999)).

³¹ *Lunney*, 94 N.Y.2d at 250–51, 723 N.E.2d at 542, 701 N.Y.S.2d at 687.

³² *Id.* at 251, 723 N.E.2d at 543, 701 N.Y.S.2d at 688. *See generally* 47 U.S.C. § 230 (2006) (describing the Communications Decency Act).

³³ *Lunney*, 94 N.Y.2d at 251, 723 N.E.2d at 543, 701 N.Y.S.2d at 688 (citing *Pulka v. Edelman*, 40 N.Y.2d 781, 785–86, 358 N.E.2d 1019, 1022–23, 390 N.Y.S.2d 393, 396–97 (1976)).

B. Firth v. State of New York

Firth was a former high-level employee of the New York State Department of Environmental Conservation (“DEC”) who claimed that in a report dated December 16, 1996, the Office of the State Inspector General (“SIG”) issued a report that was critical of his “managerial style and procurement of weapons.”³⁴

On the same day, the State Education Department [(“SED”)] posted an executive summary with links to the full text of the report on its . . . Internet site.

On March 18, 1998, more than one year after the report was first released and posted on the Internet, [Firth] filed a claim against the State alleging that the report defamed him. The State moved to dismiss on the ground that the claim was time-barred under the one-year statute of limitations for defamation

Relying on the “single publication rule:

The State proffered an affidavit from . . . [an SED] associate programmer analyst stating that on December 16, 1996 . . . he placed [the] executive summary of the report on the Internet and made links to enable users to download or view the text of the report, . . . [and] that no subsequent modifications to the text [of the report] were made.³⁵

In response, Firth argued: (1) “the single publication rule should not be applied verbatim to defamatory publications posted on the Internet in light of significant differences between Internet publications and traditional mass media” and that “[i]nstead . . . because a Web site may be altered at any time by its publisher or owner and because publications on the Internet are available only to those who seek them, each ‘hit’ or viewing of the report should be considered a new publication that retriggers the statute of limitations;”³⁶ and (2) “the State had modified the Web site by posting a report of the Inspector General regarding the Department of Motor Vehicles (DMV),” and that this “modification of a Web site should be considered a republication of information previously contained on that site.”³⁷

The court disagreed with both arguments and held that the single

³⁴ Firth v. State, 98 N.Y.2d 365, 367, 775 N.E.2d 463, 464, 747 N.Y.S.2d 69, 70 (2002).

³⁵ *Id.* at 367–68, 775 N.E.2d at 464, 747 N.Y.S.2d at 70 (citing N.Y. C.P.L.R. 215(3) (McKinney 2013)).

³⁶ *Id.* at 369, 775 N.E.2d at 465, 747 N.Y.S.2d at 71.

³⁷ *Id.* at 368, 775 N.E.2d at 464, 747 N.Y.S.2d at 70.

publication rule, which was adopted in 1948, is applicable to internet defamation.³⁸ The court described the rule as follows:

the publication of a defamatory statement in a single issue of a newspaper, or a single issue of a magazine, although such publication consists of thousands of copies widely distributed, is, in legal effect, one publication which gives rise to one cause of action and that the applicable [s]tatute of [l]imitation[s] runs from the date of that publication.³⁹

The court noted that “[u]nder the early common law of defamation, which [Firth] seeks to have applied in this case, each communication of a defamatory statement to a third person constituted a separate publication giving rise to a new cause of action.”⁴⁰ The court rejected this common law rule in *Gregoire v. G.P. Putnam’s Sons* because:

[T]he [s]tatute of [l]imitation[s] would never expire so long as a copy of such book remained in stock and is made by the publisher the subject of a sale or inspection by the public. Such a rule would thwart the purpose of the Legislature to bar completely and forever all actions which, as to the time of their commencement, overpass the limitation there prescribed upon litigation.⁴¹

Turning to the application of the single publication rule to internet defamation, the court held:

The policies impelling the original adoption of the single publication rule support its application to the posting of the Inspector General’s report regarding [Firth] on the State’s Web site. Communications accessible over a public Web site resemble those contained in traditional mass media, only on a far grander scale. Those policies are even more cogent when considered in connection with the exponential growth of the instantaneous, worldwide ability to communicate through the Internet. . . . Communications posted on Web sites may be viewed by thousands, if not millions, over an expansive geographic area for an indefinite period of time.

³⁸ *Id.* at 370, 775 N.E.2d at 466, 747 N.Y.S.2d at 72; see *Gregoire v. G.P. Putnam’s Sons*, 298 N.Y. 119, 123, 81 N.E.2d 45, 47 (1948).

³⁹ *Firth*, 98 N.Y.2d at 369, 775 N.E.2d at 464–65, 747 N.Y.S.2d at 70–71 (alteration in original) (quoting *Gregoire*, 298 N.Y. at 123, 81 N.E.2d at 47).

⁴⁰ *Firth*, 98 N.Y.2d at 369, 775 N.E.2d at 465, 747 N.Y.S.2d at 71 (citing *Gregoire*, 298 N.Y. at 122–23, 81 N.E.2d at 45).

⁴¹ *Firth*, 98 N.Y.2d at 369, 775 N.E.2d at 465, 747 N.Y.S.2d at 71 (alterations in original) (other citations omitted) (quoting *Gregoire*, 298 N.Y. at 125–26, 81 N.E.2d at 49) (internal quotation marks omitted).

Thus, a multiple publication rule would implicate an even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants. Inevitably, there would be a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise. Thus, we hold that the single publication rule applies in this case.⁴²

In summary, it appeared to this author when *Firth* was decided that the Court of Appeals was clearly signaling that it would likely apply the established legal principles adopted for traditional mass media to all internet defamation, notwithstanding that with the internet, “everyone is a publisher,” not just *The New York Times*, but also large publishing houses, newspapers, etc.⁴³

III. INTERNET DEFAMATION AND LONG-ARM JURISDICTION

Even before defamation over the internet became prevalent, there were more restrictive rules for obtaining “long-arm jurisdiction” over defendants in New York for defamation actions. CPLR section 302 sets forth acts that can form the basis for obtaining personal jurisdiction over non-domiciliaries.⁴⁴ Generally, long-arm jurisdiction can be based on the commission of a tortious act committed either within the state or outside the state, causing injury within the state, but the statute provides an express statutory exception for “cause[s] of action for defamation of character arising from the act.”⁴⁵ Although defamation claims therefore cannot form the basis for “tortious act” long-arm jurisdiction, such claims may proceed against non-domiciliaries who “transacts any business within the state.”⁴⁶

⁴² *Firth*, 98 N.Y.2d at 370, 775 N.E.2d at 465–66, 747 N.Y.S.2d at 71–72 (citations omitted). The court also rejected Firth’s alternate argument that a modification of the SED web site in May 1997 by adding an unrelated SIG Report concerning the DMV to it constituted a “republishing” of the defamatory Report at issue. *Id.* at 370–72, 775 N.E.2d at 466–67, 747 N.Y.S.2d at 72–73. Notably, Firth filed subsequent claims against the State and was able to create a question of fact on “republishing” sufficient to defeat summary judgment on the single publication rule on those claims. *Firth v. State*, 306 A.D.2d 666, 667, 761 N.Y.S.2d 361, 362 (App. Div. 3d Dep’t 2003). *But see Firth v. State*, 12 A.D.3d 907, 908, 785 N.Y.S.2d 755, 757 (App. Div. 3d Dep’t 2004) (holding that OSIG was protected against defamation claim by absolute privilege).

⁴³ This author represented Mr. Firth in the Court of Appeals and in the subsequent appeals in the Appellate Division, Third Department.

⁴⁴ N.Y. C.P.L.R. 302 (McKinney 2013).

⁴⁵ C.P.L.R. 302(a)(2), (a)(3).

⁴⁶ C.P.L.R. 302 (a)(1). As the Court of Appeals recently noted in *SPCA v. American*

This statutory distinction between defamation and non-defamation cases takes on even greater meaning with internet defamation cases because publication on the internet goes everywhere as the Court of Appeals recognized in *Firth*. Thus, internet defamation claims may often arise from the alleged “commission of a tortious act outside the state causing injury within the state,” but these claims are not subject to jurisdiction in New York at all.⁴⁷

A. SPCA of Upstate New York

Last year, in *SPCA of Upstate New York*, the Court of Appeals held, in a 4–3 decision, that plaintiffs in this defamation action failed to establish personal jurisdiction over the out-of-state defendants on the grounds of “transacting business” in New York.⁴⁸ The plaintiffs were SPCA and its Executive Director, Cathy Cloutier, and the defendants were the Ohio-based American Working Collie Association (“AWCA”), a not-for-profit corporation, and the AWCA’s president and Vermont resident, Jean Leavitt.⁴⁹

The court noted:

The AWCA is a volunteer-based club that is devoted to promoting the welfare and protection of collies, . . . [with] members throughout the United States—including 13 in New York at the time of the events herein—but . . . [it had no] office nor employees in New York. . . . The AWCA maintains a Web site (www.awca.net), generally containing photographs and anecdotes about particular collies, as well as messages from [its] president providing collie-related information of interest to the group’s members.

[I]n October . . . 2007, 23 mistreated dogs (collies and dachshunds) were rescued from a residence in Fort Ann, New York and placed with . . . [the] SPCA in its Queensbury, New York facility. . . . [Shortly] thereafter, while in Vermont,

Working Collie Ass’n:

Defamation claims are accorded separate treatment to reflect the state’s policy of preventing disproportionate restrictions on freedom of expression—though, “[w]here purposeful transactions of business have taken place in New York, it may not be said that subjecting the defendant to this State’s jurisdiction is an ‘unnecessary inhibition on freedom of speech or the press.’”

SPCA of Upstate N.Y., Inc. v. Am. Working Collie Ass’n, 18 N.Y.3d 400, 404, 963 N.E.2d 1226, 1228, 940 N.Y.S.2d 525, 527 (2012) [hereinafter *SPCA*] (citations omitted).

⁴⁷ Vincent C. Alexander, Practice Commentaries, C302:12 *in* C.P.L.R. 302.

⁴⁸ *SPCA*, 18 N.Y.3d at 402, 408, 963 N.E.2d at 1227, 1231, 940 N.Y.S.2d at 526, 530.

⁴⁹ *Id.* at 402, 963 N.E.2d at 1227, 940 N.Y.S.2d at 526.

. . . Levitt telephoned . . . Cloutier to offer the AWCA's assistance with the [rescued] animals. Subsequently, the AWCA sent the SPCA a donation in the amount of \$1,000, [and] Levitt placed . . . [another] telephone call from Vermont to advise Cloutier that the AWCA had purchased collars and leashes for the dogs and to make arrangements to deliver those materials.

Levitt visited the SPCA facility on November 7, 2007 for less than one hour, at which time Levitt delivered the leashes and collars and toured the facility, [and] also wrote a personal check to the SPCA to cover the costs of certain veterinary care. Later that month, Levitt telephoned Cloutier from Vermont for the third and final time and, during that call, they discussed the appropriate care for one of the collies. In addition, on several weekends, volunteers who were affiliated with [the] AWCA assisted in providing care for the dogs. Levitt again visited the SPCA facility on January 5, 2008, for about an hour and a half, to check on the collies.

After Levitt's return to Vermont, she generated a series of writings addressing the condition of the collies and the treatment being provided by SPCA. These writings were posted to the AWCA Web site periodically, beginning January 13, 2008. Based on statements contained in the writings, plaintiffs commenced this defamation action in January 2009. Defendants answered, asserting as relevant here, the affirmative defense of lack of personal jurisdiction. Supreme Court denied defendants' motion to dismiss, finding that personal jurisdiction had been obtained over the defendants under CPLR [section] 302 (a) (1) because Levitt purposefully availed herself of this state's benefits and protections through her trips to New York and that there was a substantial relationship between her activities here and the allegedly defamatory statements.

The Appellate Division reversed, granted defendants' motion and dismissed the complaint.⁵⁰

The majority opinion by Chief Judge Lippman began its analysis with the same test applicable to establishing long-arm jurisdiction for any defamation case, i.e., "transacting business" under CPLR

⁵⁰ *Id.* at 402–03, 963 N.E.2d at 1227–28, 940 N.Y.S.2d at 526–27 (citations omitted).

section 302(a)(1) which requires “some purposeful activities within the State that would justify bringing the nondomiciliary defendant before the New York courts.”⁵¹ In addition, the court noted that “there must be ‘some articulable nexus between the business transacted and the cause of action sued upon.’”⁵² In other words, wrote the court, “there must be ‘a substantial relationship’ between [the purposeful] activities and the transaction out of which the cause of action arose.”⁵³ The court then cited a number of examples of traditional defamation cases “determining whether the necessary substantial relationship exists between a defendant’s purposeful activities and the transaction giving rise to the defamation cause of action,” including whether the alleged relationship was “too diluted.”⁵⁴ Two examples where a sufficient relationship existed to support long-arm jurisdiction include cases where a book containing allegedly defamatory statements was researched and printed in New York and where the publishing contract was negotiated and executed in this state,⁵⁵ and an allegedly defamatory television news report that was researched over a six-week period, written, produced, and broadcast in New York.⁵⁶

⁵¹ *Id.* at 404, 963 N.E.2d at 1228, 940 N.Y.S.2d at 527 (quoting *McGowan v. Smith*, 52 N.Y.2d 268, 271, 419 N.E.2d 321, 322, 437 N.Y.S.2d 643, 644 (1981)) (internal quotation marks omitted).

⁵² *SCPA*, 18 N.Y.3d at 404, 963 N.E.2d at 1228–29, 940 N.Y.S.2d at 527–28 (quoting *McGowan*, 52 N.Y.2d at 272, 419 N.E.2d at 323, 437 N.Y.S.2d at 645).

⁵³ *SCPA*, 18 N.Y.3d at 404, 963 N.E.2d at 1229, 940 N.Y.S.2d at 528 (alterations in original) (other citations omitted) (quoting *Talbot v. Johnson Newspaper Corp.*, 71 N.Y.2d 827, 829, 522 N.E.2d 1027, 1028–29, 527 N.Y.S.2d 729, 731 (1988)).

⁵⁴ *SCPA*, 18 N.Y.3d at 404, 963 N.E.2d at 1229, 940 N.Y.S.2d at 528 (citing *Talbot*, 71 N.Y.2d at 829, 522 N.E.2d at 1028–29, 527 N.Y.S.2d at 731).

⁵⁵ *Legros v. Irving*, 38 A.D.2d 53, 56, 327 N.Y.S.2d 371, 374 (App. Div. 1st Dep’t 1971), *appeal dismissed*, 30 N.Y.2d 653, 282 N.E.2d 626, 331 N.Y.S.2d 673 (1972).

⁵⁶ *Montgomery v. Minarcin*, 263 A.D.2d 665, 667, 693 N.Y.S.2d 293, 295, 296 (App. Div. 3d Dep’t 1999). The court also cited examples of cases where “the contacts are more circumscribed and not directly related to the defamatory statement” so that “defendants . . . prevailed.” See *SPCA*, 18 N.Y.3d at 404–05, 963 N.E.2d at 1229, 940 N.Y.S.2d at 528. The court explained that in *Talbot*, the:

defendant daughter’s attendance at a New York college over two years prior to the allegedly defamatory statements made by her defendant father, relating a description of certain conduct observed by the daughter while a student in New York, was insufficient to establish the required nexus between any purposeful activities in this state and the cause of action at issue.

Id. (citing *Talbot*, 71 N.Y.2d at 829, 522 N.E.2d at 1027, 527 N.Y.S.2d at 730–31). The court also included that the *Copp v. Ramirez* court held that there was “no personal jurisdiction over non-domiciliaries who made allegedly defamatory statements in New Mexico to New York reporters from NBC’s Dateline program three years after each spent 60 hours or less at Ground Zero for purposes of producing a potential documentary.” *SCPA*, 18 N.Y.3d at 405, 963 N.E.2d at 1229, 940 N.Y.S.2d at 528 (citing *Copp v. Ramirez*, 62 A.D.3d 23, 25–26, 33, 874 N.Y.S.2d 52, 54–55, 60 (App. Div. 1st Dep’t 2009)).

In this case, the majority found first that:

defendants' activities in New York were quite limited. Levitt's three phone calls and two short visits—totaling less than three hours—in addition to the donation of cash and leashes, do not constitute purposeful activities related to the asserted cause of action that would justify bringing her before the New York courts.⁵⁷

In this regard, the majority found it “of importance that the statements were not written in or directed to New York. While they were posted on a medium that was accessible in this state, the statements were equally accessible in any other jurisdiction.”⁵⁸

Second, the majority also found that there “is no substantial relationship between the allegedly defamatory statements and defendants' New York activities.”⁵⁹ It came to this conclusion based on the facts that:

Levitt did not visit New York in order to conduct research, gather information or otherwise generate material to publish on the group's Web site, [but] defendants [simply] engaged in limited activity within the state in order to help provide financial and medical assistance for the dogs. The alleged mistreatment was observed during the course of those two brief visits but written about after Levitt returned to Vermont. The AWCA neither placed the dogs with plaintiffs in New York nor complained of its volunteers' treatment by plaintiffs, either one of which might well entail a sufficiently substantial relationship between the allegedly defamatory statements and defendants' New York activities as to warrant a finding of long-arm jurisdiction.⁶⁰

The court concluded that “[t]he connection here is too tangential to support the exercise of personal jurisdiction over defendants.”⁶¹ In so holding, the court cited with approval a decision of the Second Circuit noting that “New York courts construe transacts any business within the state more narrowly in defamation cases than they do in the context of other sorts of litigation.”⁶² According to the

⁵⁷ *SPCA*, 18 N.Y.3d at 405, 963 N.E.2d at 1229, 940 N.Y.S.2d at 528.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 405, 963 N.E.2d at 1229–30, 940 N.Y.S.2d at 528–29.

⁶¹ *Id.* at 405, 963 N.E.2d at 1230, 940 N.Y.S.2d at 529.

⁶² *Id.* (quoting *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 248 (2d Cir. 2007)) (internal quotation marks omitted). In *Best Van Lines*, the defendant was a resident of Iowa and the proprietor of a not-for-profit internet website that provides information and opinions about household movers. *Best Van Lines*, 490 F.3d at 240. He “posted derogatory comments about

SPCA decision, this is because

[t]hrough CPLR [section] 302, the Legislature has manifested its intention to treat the tort of defamation differently from other causes of action and we believe that, as a result, particular care must be taken to make certain that non-domiciliaries are not haled into court in a manner that potentially chills free speech without an appropriate showing that they purposefully transacted business here and that the proper nexus exists between the transaction and the defamatory statements at issue.⁶³

Judge Pigott's dissenting opinion (joined by Judges Graffeo and Smith) also did not employ or discuss any special rules for applying CPLR section 302(a)(1) to internet defamation cases as opposed to traditional, mass media defamation lawsuits.⁶⁴ Judge Pigott first noted that CPLR section 302(a)(1) "is a single act statute and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted."⁶⁵ The dissent disagreed with the majority's conclusion that defendants' activities in New York were "quite limited," and countered that "the record is littered with instances where the AWCA . . . purposefully avail[ed] itself of the privilege of conducting activities within [New York], such that it should reasonably . . . expect[] to defend its actions' here."⁶⁶ In addition to the activities discussed by the majority, Judge Pigott noted that "the AWCA, over eight weekends, sent members and volunteers to the SPCA to assist in exercising the dogs and cleaning their crates."⁶⁷ In addition, the dissenters found a "substantial relationship' between these 'purposeful activities' and Levitt's alleged defamatory statements. . . . For an organization whose 'purpose . . . is to promote the well-being of collies,' it cannot reasonably be said that there was no

the plaintiff, . . . a New York-based moving company . . . assert[ing] that . . . [the] [plaintiff] was performing household moves without legal authorization and without insurance . . . required by law." *Id.* Plaintiff sued for defamation. *Id.* The Southern District dismissed for lack of long-arm jurisdiction, and the Second Circuit affirmed. *Id.* at 240–41.

⁶³ *SPCA*, 18 N.Y.3d at 405–06, 963 N.E.2d at 1230, 940 N.Y.S.2d at 529.

⁶⁴ *Id.* at 406–08, 963 N.E.2d at 1230–31, 940 N.Y.S.2d at 529–30 (Pigott, J., dissenting).

⁶⁵ *Id.* at 406, 963 N.E.2d at 1230, 940 N.Y.S.2d at 529 (quoting *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467, 522 N.E.2d 40, 43, 527 N.Y.S.2d 195, 198–99 (1988)) (internal quotation marks omitted).

⁶⁶ *SCPA*, 18 N.Y.3d at 406, 963 N.E.2d at 1230, 940 N.Y.S.2d at 529 (alterations in original) (citations omitted) (internal quotation marks omitted).

⁶⁷ *Id.* at 407, 963 N.E.2d at 1231, 940 N.Y.S.2d at 530.

nexus between AWCA's purposeful activities and the alleged defamatory comments."⁶⁸

Finally, the dissent rejected "the majority's 'free speech' concern [a]s illusory in the context of this case."⁶⁹ The dissenters noted that:

There is a clear distinction between a situation where the only act which occurred in New York was the mere utterance of the libelous material [the tortious act provisions of CPLR [section] 302(a)(2) and (3), which exclude defamation claims] and on the other hand, a situation where purposeful business transactions have taken place in New York giving rise to the cause of action [the transacts business provision of CPLR section 302(a)(1)]. . . . So long as a plaintiff can establish purposeful activities on the part of the defendant and a substantial relationship between those activities and the defamation claim, there is little danger of chilling free speech through the exercise of long-arm jurisdiction.⁷⁰

B. Ehrenfeld v. Bin Mahfouz

While not nearly as relevant as *SPCA of Upstate New York*, the Court of Appeals' prior decision in *Ehrenfeld v. Bin Mahfouz*, is worth mentioning. The facts are complicated and the internet aspects of the defamation claim and resulting declaratory judgment actions relatively minor. Briefly stated, Bin Mahfouz obtained a default judgment against Ehrenfeld in a defamation action in England arising out of the publication of a book entitled *Funding Evil: How Terrorism Is Financed—and How to Stop It*, in which she asserted that "Bin Mahfouz—a Saudi Arabian businessman, financier, and former head of the National Commercial Bank of Saudi Arabia—and his family ha[d] provided direct and indirect monetary support to al Qaeda and other 'Islamist terror groups.'"⁷¹

⁶⁸ *Id.* (second alteration in original).

This conclusion was based on the following facts:

the first alleged defamatory comment was posted . . . [one] week after [Levitt's] second visit to SPCA [That visit] was precipitated by complaints made to her by AWCA volunteers about the condition of the SPCA facility [E]ach of the alleged defamatory posts addressed the conditions of the rescued dogs in New York, including accounts given by AWCA volunteers to Levitt concerning the conditions of the SPCA facility; an inference that "Levitt's purpose for going to New York (and for sending volunteers to assist at the SPCA) was to garner attention for the plight of these rescued dogs in order to promote their well being." *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 407–08, 963 N.E.2d at 1231, 940 N.Y.S.2d at 530 (citations omitted) (internal quotation marks omitted).

⁷¹ *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 504, 505, 506, 881 N.E.2d 830, 832, 833, 851

The book was published in traditional media format in the United States, but “23 copies were purchased in the United Kingdom via the Internet and a chapter of the book [was] accessible from the ABCNews.com Web site.”⁷²

Ehrenfeld commenced this action in the Southern District of New York seeking a declaratory judgment that, *inter alia*, the “default judgment [wa]s unenforceable in the United States and, particularly, in New York State,”⁷³ where she had all her assets.⁷⁴ The District Court granted Bin Mahfouz’s motion to dismiss on the grounds of lack of personal jurisdiction.⁷⁵ The Second Circuit certified the issue of long-arm jurisdiction to the New York Court of Appeals.⁷⁶

The Court of Appeals answered the Second Circuit’s certified question by concluding that Bin Mahfouz’s “contacts do not constitute the transaction of business in this state,” and therefore “conclude[d] that CPLR [section] 302 (a) (1) does not confer jurisdiction” over this declaratory judgment action.⁷⁷ In so holding, the court made two important observations relative to the internet aspects of the long-arm jurisdiction issue: “[p]laintiff’s reliance upon defendant’s posting of the result of the English action on his Web site also fails to establish purposeful availment”⁷⁸ and:

Similarly flawed is plaintiff’s assertion that defendant’s “monitoring her activities in New York,” by, among other things, . . . surveying a Web site maintained by the New York-based American Center for Democracy (www.public-integrity.org), an organization in which plaintiff serves as director, supports CPLR [section] 302 (a) (1) jurisdiction. In an age where information about many New Yorkers can be accessed by those outside our state through a simple “Google” search, we decline to find that such “monitoring,” without more, constitutes the transaction of business in New York under CPLR [section] 302 (a) (1).⁷⁹

N.Y.S.2d 381, 383, 384 (2007).

⁷² *Id.* at 504, 881 N.E.2d at 832, 851 N.Y.S.2d at 383.

⁷³ *Id.* at 506, 881 N.E.2d at 833, 851 N.Y.S.2d at 384.

⁷⁴ *Id.* at 510, 881 N.E.2d at 836, 851 N.Y.S.2d at 387.

⁷⁵ *See id.* at 506, 881 N.E.2d at 833, 851 N.Y.S.2d at 384.

⁷⁶ *Id.* at 504, 881 N.E.2d at 831, 851 N.Y.S.2d at 382.

⁷⁷ *Id.*

⁷⁸ *Id.* at 510 n.7, 881 N.E.2d at 836 n.7, 851 N.Y.S.2d at 387 n.7 (quoting *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 253–54 (2d Cir. 2007) (positing that the “posting of defamatory comments on a ‘website accessible to readers in New York . . . d(oes) not constitute ‘transact(ing) business’ under section 302(a)(1)’” (alterations in original)).

⁷⁹ *Ehrenfeld*, 9 N.Y.3d at 509 n.6, 881 N.E.2d at 835 n.6, 851 N.Y.S.2d at 386 n.6.

These observations appear consistent with the court's view of the internet in *Firth v. State*, as so extensive that legal liability for activity on it must be limited for fear that it will create legal results that would not exist in traditional media defamation cases.⁸⁰

IV. PRE-ACTION DISCLOSURE TO IDENTIFY ANONYMOUS "DEFAMERS"

CPLR section 3102(c) empowers a court to authorize pre-action disclosure. In relevant part, the statute provides: "[b]efore an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. The court may appoint a referee to take testimony."⁸¹

A common use of CPLR section 3102(c), even before internet defamation cases, was to permit pre-action disclosure for the purpose of determining the identity of prospective defendants. In fact, it is well-settled that CPLR section 3102(c) "is available to . . . determine [either] the form that the action should take and . . . who the defendant should be."⁸² Notably, pre-action discovery is available under CPLR section 3102(c) under a two-part test: "where a petitioner demonstrates that . . . [it] has a meritorious cause of action *and* that the information sought is material and necessary to the actionable wrong."⁸³ When a petitioner has a meritorious claim,

⁸⁰ See *Firth v. State*, 98 N.Y.2d 365, 370, 775 N.E.2d 463, 466, 747 N.Y.S.2d 69, 72 (2002). The court noted:

Communications accessible over a public Web site resemble those contained in traditional mass media, only on a far grander scale. Those policies are even more cogent when considered in connection with the exponential growth of the instantaneous, worldwide ability to communicate through the Internet. As aptly stated in *Reno v. [ACLU]*, 521 U.S. 844, 853 (1997), "[f]rom the publisher's point of view, [the World Wide Web] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers." Communications posted on Web sites may be viewed by thousands, if not millions, over an expansive geographic area for an indefinite period of time.

Thus, a multiple publication rule would implicate an even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants. Inevitably, there would be a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise.

Id. at 370, 775 N.E.2d at 465–66, 747 N.Y.S.2d at 71–72 (alterations in original) (citations omitted) (internal quotation marks omitted).

⁸¹ N.Y. C.P.L.R. 3102(c) (McKinney 2013).

⁸² *Bergan v. Sullivan Bros. Wood Prods. of Keeseville, Inc.*, 77 A.D.2d 723, 724, 430 N.Y.S.2d 422, 423 (App. Div. 3d Dep't 1980) (quoting *In re Janosik*, 71 A.D.2d 1058, 1058, 420 N.Y.S.2d 815, 816 (App. Div. 4th Dep't 1979)).

⁸³ *Bishop v. Stevenson Commons Assoc., L.P.*, 74 A.D.3d 640, 641, 905 N.Y.S.2d 29, 30 (App. Div. 1st Dep't 2010) (emphasis added) (citing *Liberty Imports v. Bourguet*, 146 A.D.2d

and the identity of the defendant(s) in an action that petitioners plan to commence is not ascertainable without responsive information from the respondent(s), a petitioner should be entitled to pre-action disclosure of the identity of the defendant(s) on the grounds that it has demonstrated that the information is “material and necessary” to commence an action.⁸⁴

Given the extensive number of “anonymous” postings on the internet, pre-action disclosure to obtain the true identity of the potential defendant in a defamation action is critical and has taken on much greater significance. Many times, the pre-action disclosure is sought from third-parties who will not be potential defendants in the defamation action, but simply have the identity information in their possession.⁸⁵ In addition to chat rooms and other possible sources of anonymous defamatory statements, two frequent sources of such statements are: (1) anonymous email addresses through an account such as a “Gmail” or “Yahoo” account;⁸⁶ and (2)

535, 536, 536 N.Y.S.2d 784, 786 (App. Div. 1st Dep’t 1989), *appeal denied*, 16 N.Y.3d 702, 942 N.E.2d 319, N.Y.S.2d 108 (2011).

⁸⁴ See generally *In re Seymour*, 288 A.D.2d 894, 894, 732 N.Y.S.2d 764, 764 (App. Div. 4th Dep’t 2001) (“Supreme Court properly granted the application of petitioner, [an aide in the X-ray Department at respondent Kenmore Mercy Hospital], for pre-action disclosure requiring the Hospital to disclose . . . the name and address of the male patient . . . weighing approximately 400 pounds who fell on top of her while she was attempting to assist him onto an X-ray table.”); *In re Varney*, 126 A.D.2d 953, 953–54, 511 N.Y.S.2d 725, 725–26 (App. Div. 4th Dep’t 1987) (“[P]etitioner has made a prima facie demonstration that he has a cause of action against the prospective defendant . . . [from whom he seeks preaction disclosure], and that the information he seeks is material and necessary to that actionable wrong. . . . It is apparent that preaction disclosure is required to determine what form the action should take.” (citation omitted)); *Weaver v. Waterville Knitting Mills, Inc.*, 78 A.D.2d 574, 574, 432 N.Y.S.2d 419, 420 (App. Div. 4th Dep’t 1980) (“Special Term’s exercise of discretion in granting [pre-action] disclosure” to permit plaintiff to frame a complaint and identify prospective defendants was appropriate).

⁸⁵ See, e.g., *Pub. Relations Soc’y of Am., Inc. v. Road Runner High Speed Online*, 8 Misc. 3d 820, 821, 799 N.Y.S.2d 847, 849 (Sup. Ct. N.Y. County 2005).

⁸⁶ *Lunney v. Prodigy Services Co.*, discussed above, is the perfect example of an “imposter” using someone else’s name as part of an anonymous e-mail account. *Lunney v. Prodigy Servs. Co.*, 94 N.Y.2d 242, 246, 723 N.E.2d 539, 539–40, 701 N.Y.S.2d 684, 684–85 (1999). In *Lunney*, an imposter opened accounts using the plaintiff’s name and posted vulgar messages to an internet bulletin board and sent threatening, profane e-mail messages. *Id.*

For example, Gmail is an advertising-supported email service that is provided by Google for free to the public. RYAN TEETER & KARL BARKSDALE, *GOOGLE APPS FOR DUMMIES* 364 (2008). Gmail became available to the general public in 2007. Stacy Jones, *A Real E-mail Blast: N.J. Lab Creates Missives That Implode*, STAR-LEDGER (New Jersey), Apr. 22, 2012, at 1. It is secure webmail service. *Changing the HTTPS Settings*, GOOGLE, <http://support.google.com/mail/bin/answer.py?hl=en&answer=74765> (last visited Feb. 28, 2013). Gmail provides users with free storage of 10 GB, with attachments of up to 25 MB. *Your Storage Limits*, GMAIL (last updated Oct. 16, 2012), <http://support.google.com/mail/bin/answer.py?hl=en&answer=6558>. As of June 2012, it has 425 million users worldwide. *Google Tweaks Main Results Page*, MONTREAL GAZETTE (Can.), Aug. 9, 2012, at B14.

“unauthorized” websites that appear by their name to be created and maintained by a known entity or person, but are actually registered to an anonymous owner who wants to remain anonymous specifically because the unauthorized website was created and is maintained specifically to present information on the website that is potentially defamatory of the purported owner or others.⁸⁷ Pre-

Google provides in its “Policies and Principles” that “[p]rotecting your privacy hasn’t changed . . . Our privacy principles remain unchanged. And we’ll never sell your personal information or share it without your permission (other than rare circumstances like valid legal requests).” *Policies & Principles*, GOOGLE, <http://www.google.com/intl/en/policies> (last visited Jan. 18, 2013). Thus, Google maintains the identification information that a petitioner in a pre-action disclosure proceeding would be seeking. *See generally Pub. Relations Soc’y of Am., Inc.*, 8 Misc. 3d at 822, 799 N.Y.S.2d at 849 (providing an example of an internet service provider being compelled to disclose identification information).

Notably, Google routinely receives applications for pre-action disclosure—which it does not directly oppose, but turns over to its subscriber—to identify the registered user of a Gmail account because it does not voluntarily provide its subscribers’ information to third parties like petitioners in pre-action disclosure proceedings. *See Policies & Principles, supra*.

⁸⁷ Today, the same thing can be done with websites as e-mail accounts in *Lunney*. *See generally Lunney*, 94 N.Y.2d at 246, 723 N.E.2d at 539–40, 701 N.Y.S.2d at 684–85 (providing the facts of *Lunney*). For example, anyone can register a new website with DomainsbyProxy.com, (“Domains”) which is an affiliate of Go Daddy, Inc. (“Go Daddy”), which is well known for its Super Bowl commercials featuring Danica Patrick. *Private Domain Names Multiply*, ARIZ. REPUBLIC, Nov. 6, 2011, at D1 (“Go Daddy invented and launched the concept of private registration in 2002 with the formation of an affiliate company called Domains By Proxy Inc. It has been hugely successful, and nearly every Go Daddy competitor has since copied the idea.”); John D. Gonzalez, Super Bowl Ads Expected to Turn Down the Heat, SAGINAW NEWS (Mich.), Feb. 3, 2013 (“Go Daddy—known for its racy ads and spokeswoman/race car driver Danica Patrick—has two spots [during] this year[’s Super Bowl].”). If a potential plaintiff attempts to determine who the actual registered owner of the unauthorized website is through www.register.com/whois, the registered owner simply comes up “Domains by Proxy,” the exact secret, privacy service advertised and sold by Domains by Proxy.” *See, e.g., Whois Lookup*, REGISTER.COM, www.register.com/whois.rcm (last visited Jan. 19, 2013); *see also Whois Lookup*, HOSTBABY.COM, www.hostbaby.com/whois.php?domain=checkmate4quicken.com (last visited Jan. 18, 2013) (“In most cases, GoDaddy.com, LLC is not the registrant of domain names listed in this database.”).

Domains by Proxy is a website that “allows the registrant of an Internet domain, or Web address, to keep his or her name and contact information out of a searchable online directory.” *Private Domain Names Multiply, supra*; *see also Cohen v. Newsom*, No. C 08-01443 SI, 2009 WL 482255, at *2 (N.D. Cal. Feb. 25, 2009) (“Defendants claim that plaintiff could have hidden his home address at any time by buying Go Daddy’s privacy service. For a fee, Go Daddy offers customers a ‘privacy’ service that hides the name and contact information of website owners. When a customer buys the service, the website’s registration name and all contact information are displayed as belonging to ‘Domains by Proxy,’ rather than the website owner.” (citation omitted)).

Domains by Proxy specifically advertises to its subscribers that: “Your identity is nobody’s business but ours,” “[o]ur contact information is made public in the WHOIS directory—not yours,” and Domains by Proxy “was the Internet’s very first Whois privacy service. Our service was born from consumer demand, since many Internet users didn’t want their personal information available for everyone to see in the Whois directory.” DOMAINS BY PROXY, www.domainsbyproxy.com, (last visited Jan. 18, 2013).

Pre-action disclosure will likely be necessary from Domains because its “civil subpoena

action disclosure from these third-party ISPs will almost always be necessary.⁸⁸

These cases are significant, not so much for the defamation law addressed—even though that is usually the main focus of the decisions—but to demonstrate this entirely new litigation step that a plaintiff in an internet defamation case will often have to endure whenever the publisher of the defamatory statement is anonymous on the internet.

While a number of trial courts have addressed this issue,⁸⁹ the most comprehensive decision so far is the First Department's ruling in *Sandals Resorts International Ltd. v. Google, Inc.*⁹⁰ The court held that Sandals, which operates multiple resorts in Jamaica, was not entitled to pre-action discovery of information and materials

policy” specifically states:

Domains By Proxy's Privacy Policy prohibits the release of customer or account information without express permission from the customer, except when required by law, to conform to the edicts of the law, or to comply with legal process properly served on Domains By Proxy or one of its affiliates.

If you seek the identity or account information of a Domains By Proxy customer in connection with a civil legal matter, you must fax, mail, or serve Domains By Proxy, LLC with a valid subpoena.

Civil Subpoena Policy, DOMAINS BY PROXY, <http://www.domainsbyproxy.com/policy/subpoena.aspx> (last visited Feb. 28, 2013).

⁸⁸ See, e.g., *Sony Music Entm't Inc. v. Does 1–40*, 326 F. Supp. 2d 556, 558–59 (S.D.N.Y. 2004).

⁸⁹ See, e.g., *Varrenti v. Gannett Co.*, 33 Misc. 3d 405, 406, 413, 929 N.Y.S.2d 671, 673, 677 (Sup. Ct. Monroe County 2011) (discussing how a police chief and officers who filed suit against newspaper and four John/Jane Doe defendants who posted allegedly defamatory comments regarding police chief and officers on newspaper's website in response to a newspaper's articles posted on Internet were not entitled to order requiring newspaper to provide names, addresses, and identities and/or any relevant pedigree information for four anonymous defendants because posted comments were non-defamatory protected opinions); *In re Cohen*, 25 Misc. 3d 945, 946, 949, 887 N.Y.S.2d 424, 425, 427 (Sup. Ct. N.Y. County 2009) (holding that a petitioner alleging she was defamed by an anonymous blogger on blog maintained by internet company was entitled to pre-action disclosure of information as to the identity of the anonymous blogger); *In re Greenbaum*, 18 Misc. 3d 185, 186, 190–91, 845 N.Y.S.2d 695, 697, 700–01 (Sup. Ct. N.Y. County 2007) (denying elected school board member's proceeding for pre-action discovery against ISP that maintained internet website for hosting of internet blogs, contending that she was defamed by comments made by anonymous operator of blog on website and by anonymous commentators who posted statements on that blog, and seeking disclosure from ISP of data identifying operator and commentators; petitioner failed to demonstrate valid defamation claim); *Pub. Relations Soc'y*, 8 Misc. 3d at 821, 822, 827–28, 799 N.Y.S.2d at 849–50, 853–54 (denying anonymous motion of sender of allegedly defamatory e-mail to intervene in proceeding for pre-action disclosure by petitioners to identify sender for defamation action against sender, and to vacate default judgment granting petitioners' motion for pre-action disclosure of documents identifying sender, and concluding that the First Amendment does not preclude discovery of sender's identifying internet user information).

⁹⁰ *Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 925 N.Y.S.2d 407 (App. Div. 1st Dep't 2011).

that would enable it to bring a libel claim against the account holder of an anonymous email account from which an email was sent that implicitly criticized Sandals' treatment of native Jamaicans because Sandals failed to demonstrate a meritorious cause of action for defamation as required to warrant pre-action discovery.⁹¹

The court noted that the appeal raised several questions, including "the social context of the e-mail at issue, and anonymous e-mail communications generally."⁹² The e-mail in question was from a Google e-mail account and "[t]he writer of the e-mail [was] identified as John Anthony at 'jft3092@gmail.com.'"⁹³ Sandals contended that the e-mail was "false and defamatory in asserting essentially that Sandals is racist and discriminatory in hiring non-Jamaicans for all positions of management and authority, and giving native Jamaicans only low-paying menial jobs."⁹⁴ It sought:

all information concerning the Google account designated as jft3092@gmail.com including but not limited to all e-mail, instant messages, text messages, buddy lists, address books, contact lists, account histories, account settings, profiles, mail boxes, folder structure, detailed billing, user activity records (log on and log off times), user identification records, phone number access records, ISP access records, and all information provided by the user at the time the account was created.⁹⁵

Thereafter, "Google notified the account holder and provided him with a copy of the order to show cause and petition."⁹⁶ The account holder anonymously contacted the motion court, and asserted in opposition that the e-mail was not defamatory.⁹⁷

The First Department affirmed the Supreme Court, New York County's dismissal of the petition.⁹⁸ The petition failed, not because the identity of the anonymous e-mail sender was not necessary to the defamation action,⁹⁹ but because "[t]he petition fail[ed] to

⁹¹ *Id.* at 34, 38, 45, 925 N.Y.S.2d at 409, 411, 416.

⁹² *Id.* at 34, 925 N.Y.S.2d at 409.

⁹³ *Id.* Unfortunately for the court's substantive analysis of the potential defamation claim, there were "gaps" in the e-mail presented in the Record. *Id.* at 34–35, 925 N.Y.S.2d at 409.

⁹⁴ *Id.* at 37, 925 N.Y.S.2d at 411.

⁹⁵ *Id.* at 37–38, 925 N.Y.S.2d at 411.

⁹⁶ *Id.* at 38, 925 N.Y.S.2d at 411.

⁹⁷ *Id.*

⁹⁸ *Id.* at 45, 925 N.Y.S.2d at 416.

⁹⁹ *See generally id.* at 38–45, 925 N.Y.S.2d at 411–16 (noting that the court did not reference the anonymity of the e-mail sender as a reason for the petitions failure).

demonstrate that Sandals ha[d] a meritorious cause of action” for defamation.¹⁰⁰ It so held on three grounds: (1) “nothing in the petition identifies specific assertions of fact as false,” i.e., “contradicting the email’s claim that Sandals offers only menial jobs to native Jamaicans of African heritage”; (2) as a corporate entity Sandals were required and failed to allege that “the publication injured its business reputation or its credit standing” in order to allege “a cause of action for libel *per se*,” and (3) “the subject email is constitutionally protected opinion.”¹⁰¹

While the court had little trouble finding that the alleged defamatory statements at issue were non-actionable opinion rather than statements of fact under traditional mass media opinion versus fact defamation analysis, it specifically engaged in a detailed discussion of the issue vis-à-vis the fact that the statement was made on the internet. Thus, it found that “consideration of the ‘broader social context into which the statement fits’” in the opinion versus fact analysis required it to consider the unique media that is internet publication and speech.¹⁰² The court noted that “[t]he culture of Internet communications, as distinct from that of print media such a newspapers and magazines, has been characterized as encouraging a ‘freewheeling, anything-goes writing style.’”¹⁰³ The court then quoted extensively and with approval from a law review article on this issue as follows:

“It is . . . imperative that courts learn to view libel allegations within the unique context of the Internet. In determining whether a plaintiff’s complaint includes a published ‘false and defamatory statement concerning another,’ commentators have argued that the defamatory import of the communication must be viewed in light of the fact that bulletin boards and chat rooms ‘are often the repository of a wide range of casual, emotive, and imprecise speech,’ and *that the online ‘recipients of [offensive] statements do not necessarily attribute the same level of credence to the statements [that] they would accord to statements made in other contexts.’* Because the context of a statement impacts its potentially defamatory import, it is

¹⁰⁰ *Id.* at 38, 925 N.Y.S.2d at 411.

¹⁰¹ *Id.* at 39, 925 N.Y.S.2d at 412 (citations omitted).

¹⁰² *Id.* at 43, 925 N.Y.S.2d at 415 (quoting *Ollman v. Evans*, 750 F.2d 970, 983 (D.C. Cir. 1984)).

¹⁰³ *Sandals Resorts Int’l Ltd.*, 86 A.D.3d at 43, 925 N.Y.S.2d at 415 (quoting Eirik Cheverud, Comment, *Cohen v. Google, Inc.*, 55 N.Y.L. SCH. L. REV. 333, 335 (2011)).

necessary to view allegedly defamatory statements published on the Internet within the broader framework on which they appear, taking into account both the tenor of the chat room or message board in which they are posted, and the language of the statements. The low barrier to speaking online allows anyone with an Internet connection to publish his thoughts, free from the editorial constraints that serve as gatekeepers for most traditional media of disseminating information. Often, this results in speech characterized by grammatical and spelling errors, the use of slang, and, in many instances, an overall lack of coherence.”¹⁰⁴

The court wrote that “[t]he observation that readers give less credence to allegedly defamatory remarks published on the Internet” was “equally valid for anonymous Web logs, known as blogs, and . . . widely distributed e-mail commentary” at issue here as it is to “posted remarks on message boards and in chat rooms.”¹⁰⁵

The court then wrote that

the e-mail at issue here . . . bears some similarity to the type of handbills and pamphlets whose anonymity is protected when their publication is prompted by the desire to question, challenge and criticize the practices of those in power without incurring adverse consequences such as economic or official retaliation. Indeed, the anonymity of the e-mail makes it more likely that a reasonable reader would view its assertions with some skepticism and tend to treat its contents as opinion rather than as fact.¹⁰⁶

The court quickly noted, however, that

[t]his observation is in no way intended to immunize e-mails the focus and purpose of which are to disseminate injurious falsehoods about their subjects. However, we should protect against “[t]he use of subpoenas by corporations and plaintiffs with business interests to enlist the help of ISPs via court orders to silence their online

¹⁰⁴ *Sandals Resorts Int’l Ltd.*, 86 A.D.3d at 43–44, 925 N.Y.S.2d at 415–16 (alterations in original) (emphasis added) (quoting Jennifer O’Brien, Note, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 FORDHAM L. REV. 2745, 2774–75 (2002)).

¹⁰⁵ *Sandals Resorts Int’l Ltd.*, 86 A.D.3d at 44, 925 N.Y.S.2d at 416.

¹⁰⁶ *Id.* (citing Noah Levine, Note, *Establishing Legal Accountability for Anonymous Communication in Cyberspace*, 96 COLUM. L. REV. 1526, 1530 (1996); Ryan M. Martin, Comment, *Freezing the Net: Rejecting a One-Size-Fits-All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuits*, 75 U. CIN. L. REV. 1217, 1219 (2007)).

critics[, which] threatens to stifle the free exchange of ideas.”¹⁰⁷

It will certainly be interesting to see if the Court of Appeals adopts this reasoning or a variation of it when it encounters this issue. Certainly, the First Department has taken the view that internet publications get extra consideration when deciding if they express opinion versus fact for purposes of a valid defamation claim.¹⁰⁸ This is truly significant insofar as New York already provided traditional mass media with greater “opinion” protection for allegedly defamatory statements than is required by the First Amendment under United States Supreme Court precedents.¹⁰⁹

V. THE COURT OF APPEALS COMES FULL CIRCLE AND DISMISSES
INTERNET DEFAMATION CLAIMS UNDER THE CDA IN *SHIAMILI* IN
ANOTHER SPLIT DECISION

In 2011 in *Shiamili v. Real Estate Group of New York, Inc.*,¹¹⁰ the Court of Appeals returned to its internet defamation “roots” and decided a question left unanswered in 1999 in *Lunney*, the application of the CDA to internet defamation claims in New York.¹¹¹ “[C]onsider[ing] for the first time whether a plaintiff’s claim against a Web site operator arising out of allegedly defamatory comments posted to the Web site is barred by the Communications Decency Act (CDA),” a majority of the court, in an opinion by Judge Ciparick, “conclude[d] that it is, and that the defendants’ motion to dismiss the complaint was properly granted.”¹¹² The three dissenters did not disagree on the law, but on the application of the facts of this case to that law in concluding that dismissal was not warranted.¹¹³ The facts of the case are,

¹⁰⁷ *Sandals Resorts Int’l Ltd.*, 86 A.D.3d at 45, 925 N.Y.S.2d at 416 (alterations in original) (quoting Clay Calvert et al., *David Doe v. Goliath, Inc.: Judicial Ferment in 2009 for Business Plaintiffs Seeking the Identities of Anonymous Online Speakers*, 43 J. MARSHALL L. REV. 1, 15 (2009)).

¹⁰⁸ *See Sandals Resorts Int’l Ltd.*, 86 A.D.3d at 43–45, 925 N.Y.S.2d at 415–16.

¹⁰⁹ *See, e.g., Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235, 249, 567 N.E.2d 1270, 1278, 566 N.Y.S.2d 906, 914 (1991) (“[T]he protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the Federal Constitution.” (citation omitted) (internal quotation marks omitted)).

¹¹⁰ *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 17 N.Y.3d 281, 952 N.E.2d 1011, 929 N.Y.S.2d 19 (2011).

¹¹¹ *Id.* at 288–89, 952 N.E.2d at 1017, 929 N.Y.S.2d at 25 (citing *Lunney v. Prodigy Servs. Co.*, 94 N.Y.2d 242, 251, 723 N.E.2d 539, 543, 701 N.Y.S.2d 684, 688 (1999)).

¹¹² *Shiamili*, 94 N.Y.3d at 284, 952 N.E.2d at 1014, 929 N.Y.S.2d at 22.

¹¹³ *Id.* at 295, 952 N.E.2d at 1021, 1022, 929 N.Y.S.2d at 29, 30 (Lippman, J., dissenting).

therefore, extremely important.

A. The Majority Opinion

“[P]laintiff . . . Shiamili [was] the founder and CEO of Ardor, . . . a New York apartment rental and sales company”; defendants were TREGNY, a competitor of Ardor’s which also sold and rented New York City apartments, Baum (TREGNY’s COO), and McCann (Baum’s assistant).¹¹⁴

These defendants . . . “administer and choose content for” a publicly accessible [internet] . . . “blog”—dedicated to the New York City real estate industry. In February 2008, . . . a lengthy comment was added to a discussion thread [on the defendants’ blog] by a user operating under the pseudonym “Ardor Realty Sucks.” The comment made several allegedly defamatory statements suggesting that Shiamili mistreated his employees and was racist and anti-Semitic, referring to one of the company’s agents as “his token Jew.” McCann, in his role as website administrator, moved the comment to a stand-alone post, prefacing it with the statement that “the following story came to us as a . . . comment, and we promoted it to a post.” The post was given the heading, “Ardor Realty and *Those People*,” and the subheading, “*and now it’s time for your weekly dose of hate, brought to you unedited, once again, by ‘Ardor Realty Sucks’.* and for the record, we are **so. not. afraid.**” The post was accompanied by a traditional image of Jesus Christ with Shiamili’s face and the words “Chris Shiamili: King of the Token Jews.”

Several of the comments posted by anonymous users in the ensuing discussion thread contained further allegedly defamatory statements, including suggestions that Ardor was in financial trouble and that Shiamili abused and cheated on his wife. One of the commentators ended by saying “call me a Liar and I’ll come back here and get REALLY specific.” The complaint allege[d] that McCann, under a pseudonym, responded, “liar” in an attempt to encourage the user to say more, but that commentator did not post further. Shiamili responded by drafting a lengthy comment, which was added to the discussion thread. . . . [and] contacted McCann and requested that he remove the

¹¹⁴ *Id.* at 284, 952 N.E.2d at 1014, 929 N.Y.S.2d at 22 (majority opinion).

defamatory statements, but McCann refused to do so.

Shiamili . . . alleg[ed] in his complaint that the defamatory statements were made with the intent to injure his reputation, and that defendants either ‘made’ or published the statements.¹¹⁵

The complaint sought both damages and injunctive relief.¹¹⁶ The “[d]efendants moved to dismiss the complaint for failure to state a cause of action” and “submitted an affidavit [of McCann, who] acknowledg[ed] that he was the ‘administrator and moderator’ of the Web site” and as such he was the only person who “could create stand-alone posts capable of generating their own discussion threads.”¹¹⁷

“Supreme Court denied the motion to dismiss,” finding that discovery was necessary as to “‘defendants’ role, if any, in authoring or developing the content of the website, [which] is exclusively within their possession.’”¹¹⁸ The First Department “unanimously reversed, granted the motion to dismiss, and dismissed the complaint, [on the grounds]. . . that the CDA bars Shiamili’s claim[s].”¹¹⁹

The court discussed the CDA in more detail than necessary for this article. As is relevant here, the court first noted that by enacting section 230 of the CDA, “Congress has carved out an exception for Internet publication” from the common law rule that “a publisher of defamatory material authored by a third party is generally subject to tort liability.”¹²⁰

The court noted:

Section 230 establishes that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,” and it preempts any state law—including imposition of tort liability—inconsistent with its protections. [Under the CDA, a] defendant is therefore

¹¹⁵ *Id.* at 284–85, 952 N.E.2d at 1014–15, 929 N.Y.S.2d at 22–23.

¹¹⁶ *Id.* at 285, 952 N.E.2d at 1015, 929 N.Y.S.2d at 23.

¹¹⁷ *Id.* at 286, 952 N.E.2d at 1015, 929 N.Y.S.2d at 23.

¹¹⁸ *Id.* (quoting *Shiamili v. Real Estate Grp. of N.Y., Inc.*, No. 600460/08, 2008 WL 5478706, at *5 (Sup. Ct. N.Y. County Dec. 26, 2008), *rev’d*, 68 A.D.3d 581, 892 N.Y.S.2d 52 (App. Div. 1st Dep’t 2009), *aff’d*, 17 N.Y.3d 81, 952 N.E.2d 1011, 929 N.Y.S.2d 19 (2011)).

¹¹⁹ *Shiamili*, 94 N.Y.3d at 286, 952 N.E.2d at 1015, 929 N.Y.S.2d at 23 (citing *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 68 A.D.3d 581, 583, 892 N.Y.S.2d 52, 54 (App. Div. 1st Dep’t 2009), *aff’d*, 17 N.Y.3d 81, 952 N.E.2d 1011, 929 N.Y.S.2d 19 (2011)).

¹²⁰ *Shiamili*, 17 N.Y.3d at 286, 952 N.E.2d at 1015, 929 N.Y.S.2d at 23. The CDA was passed as part of the Telecommunications Act of 1996, Pub. L. 104–104, §§ 501–52, 110 Stat. 56, 133–42 (1996).

immune from state law liability if (1) it is a “provider or user of an interactive computer service”; (2) the complaint seeks to hold the defendant liable as a “publisher or speaker”; and (3) the action is based on “information provided by another information content provider.”¹²¹

As particularly relevant here, “[t]he statute defines an ‘information content provider’ as ‘any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.’”¹²²

The court noted that although “[b]oth state and federal courts around the country have ‘generally interpreted Section 230 immunity broadly,’” it had not addressed the scope of the CDA’s immunity in *Lunney*.¹²³ On the broad question of the sweep of the CDA’s protection, the majority wrote that

[t]oday, we follow what may fairly be called the national consensus and read section 230 as generally immunizing Internet service providers from liability for third-party content wherever such liability depends on characterizing the provider as a “publisher or speaker” of objectionable material.

Consistent with this view, we read section 230 to bar “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.”¹²⁴

The majority then turned to the more specific issue presented on the appeal—whether the defendants were “content providers” with respect to the allegedly defamatory material here because “[s]ervice providers are only entitled to . . . broad immunity [under the CDA], however, where the content at issue is provided by ‘another information content provider.’”¹²⁵ The court noted that “[i]t may be

¹²¹ *Shiamili*, 17 N.Y.3d at 286–87, 952 N.E.2d at 1015, 929 N.Y.S.2d at 23 (other citations omitted) (quoting 47 U.S.C. § 230(c)(1) (2006)).

¹²² *Shiamili*, 17 N.Y.3d at 287, 952 N.E.2d at 1015, 929 N.Y.S.2d at 23 (quoting 47 U.S.C. § 230(f)(3)).

¹²³ *Shiamili*, 17 N.Y.3d at 288, 952 N.E.2d at 1016–17, 929 N.Y.S.2d at 24–25 (other citations omitted) (quoting *Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007)).

¹²⁴ *Shiamili*, 17 N.Y.3d at 288–89, 952 N.E.2d at 1017, 929 N.Y.S.2d at 25 (other citations omitted) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

¹²⁵ *Shiamili*, 17 N.Y.3d at 289, 952 N.E.2d at 1017, 929 N.Y.S.2d at 25 (quoting 47 U.S.C. § 230(c)(1)).

difficult in certain cases to determine whether a service provider is also a content provider, particularly since the definition of ‘content provider’ is any party “‘responsible . . . in part,’ for the ‘creation or development of information.’”¹²⁶ The court further wrote that “no consensus has emerged concerning what conduct constitutes ‘development,’” and declined Shiamili’s invitation to adopt “the Ninth Circuit’s relatively broad view of ‘development’ since, even under that court’s analysis, Shiamili’s claim fails.”¹²⁷ Since it was undisputed that defendants “are providers of an ‘interactive computer service’ under section 230” and that the defamation claim sought “to hold defendants liable as publishers and speakers, [t]he [only] remaining question [was] whether, taking the facts alleged in the complaint as true, the defamatory statements were ‘provided by another information content provider.’”¹²⁸

The majority came to the conclusion that defendants were not “content providers” under the statute through a multi-step process:

the complaint allege[d] that the defamatory statements were first posted by anonymous users; there [was] no allegation that defendants actually authored the statements, [and a] Web site is generally not a ‘content provider’ with respect to comments posted by third-party users. [The Court rejected Shiamili’s] contention that defendants should be deemed content providers because they created and ran a Web site which implicitly encouraged users to post negative comments about the New York City real estate industry, [because c]reating an open forum for third parties to post content—including negative commentary—is at the core of what section 230 protects.

Moreover, there [was] no allegation that the defamatory comments were posted in response to any specific invitation [by defendants] for users to bash Shiamili or Ardor. [In fact, Shiamili acknowledged] that the Web site had been operating for over a year before any of the comments that are the subject of this lawsuit were posted, and that the posted commentary spanned a range of topics. [The court wrote that e]ven assuming that solicitation can constitute “development,” this is plainly not a case where the Web site

¹²⁶ *Shiamili*, 17 N.Y.3d at 289, 952 N.E.2d at 1017, 929 N.Y.S.2d at 25 (alteration in original) (quoting 47 U.S.C. § 230(f)(3)).

¹²⁷ *Shiamili*, 17 N.Y.3d at 289, 290, 952 N.E.2d at 1017, 1018, 929 N.Y.S.2d at 25, 26.

¹²⁸ *Id.* at 290, 952 N.E.2d at 1018, 929 N.Y.S.2d at 26 (quoting 47 U.S.C. § 230(c)(1)).

can be charged with soliciting the defamatory content at issue. Nor can it be said that McCann's attempt at provoking further commentary in the Shiamili discussion thread is actionable, since none followed.

[Further,] the defendants did not become "content providers" by virtue of moving one of the comments to its own post [because r]eposting content created and initially posted by a third party is well within "a publisher's traditional editorial functions."¹²⁹

Contrary to Shiamili's arguments, this case does not fit within a line of federal decisions in which courts have found that "even if the data are supplied by third parties, a website operator may still contribute to the content's illegality and thus be liable as a developer" of the content."¹³⁰

Finally, although defendants were "content providers" with respect to the heading, subheading, and illustration that accompanied the reposting, that content is not defamatory as a matter of law."¹³¹ Notable to the majority was the fact that the "complaint does not allege that the heading and subheading are actionable, but only that they 'preceded' and 'prefaced' the objectionable commentary."¹³² Although Shiamili alleged that "[t]he illustration that accompanied the post [was] . . . a 'false and defamatory statement[] of fact,' all it state[d] was] that Shiamili [was] 'King of the Token Jews.'"¹³³ According to the majority,

[t]his is not a defamatory statement, since no "reasonable reader could have concluded that [it was] conveying facts about the plaintiff." The illustration was obviously satirical and, although offensive, it cannot by itself support Shiamili's claim of defamation. Nor, contrary to the dissent's view, does it "develop" or "contribute[] materially to the alleged illegality" of the third-party content within the meaning of the CDA.¹³⁴

¹²⁹ *Shiamili*, 17 N.Y.3d at 290–91, 952 N.E.2d at 1018–19, 929 N.Y.S.2d at 26–27 (other citations omitted) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

¹³⁰ *Shiamili*, 17 N.Y.3d at 292, 952 N.E.2d at 1019, 929 N.Y.S.2d at 27 (other citations omitted) (quoting *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1171 (9th Cir. 2008)).

¹³¹ *Shiamili*, 17 N.Y.3d at 292, 952 N.E.2d at 1019, 929 N.Y.S.2d at 27.

¹³² *Id.*

¹³³ *Id.* at 292, 952 N.E.2d at 1019–20, 929 N.Y.S.2d at 27–28.

¹³⁴ *Id.* at 292–93, 952 N.E.2d at 1020, 929 N.Y.S.2d at 28 (second and third alteration in the original) (quoting *id.* at 294, 952 N.E.2d at 1021, 929 N.Y.S.2d at 29 (Lippman, C.J., dissenting); *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 152, 623 N.E.2d 1163, 1167, 603

In summary, the majority found that the allegedly defamatory statements were all posted by a third-party on defendants' website, some of which were reposted by defendants, but defendants "added headings and illustration do not materially contribute to the defamatory nature of the third-party statements."¹³⁵ Thus, Shiamili's claims "are clearly barred by the CDA and were properly dismissed below."¹³⁶

B. *The Dissent*

Chief Judge Lippman authored a dissenting opinion, joined by Judges Pigott and Jones.¹³⁷ The dissent made it clear from the beginning that its dispute with the majority was over the application of the facts to largely agreed upon rules of law under the CDA:

It is unfortunate that in this, our first case interpreting the . . . CDA, . . . we have shielded defendants from the allegation that they abused their power as Web site publishers to promote and amplify defamation targeted at a business competitor. *Even in the muted form in which the majority presents them, the allegations concerning the Web site operator's material contributions to the scurrilous defamatory attacks against Mr. Shiamili and Ardor Realty are sufficiently stated and are outside the scope of CDA immunity.*

. . .

If the complaint alleged that defendants merely reposted these outrageous statements to a more prominent position on the Web site, this could plausibly be considered an exercise of "a publisher's traditional editorial functions." But, the allegations of defendants' actions here are not so benign.¹³⁸

The dissent emphasized that the "defendants not only moved the defamatory comments to an independent post," but also "embellished the comment thread by attaching a large, doctored photograph of plaintiff depicted as Jesus Christ, with the heading: 'Chris Shiamili: King of the Token Jews,'" and introduced the whole

N.Y.S.2d 813, 817 (1993)).

¹³⁵ *Shiamili*, 17 N.Y.3d at 293, 952 N.E.2d at 1020, 929 N.Y.S.2d at 28 (majority opinion).

¹³⁶ *Id.*

¹³⁷ *Id.* at 296, 952 N.E.2d at 1022, 929 N.Y.S.2d at 30 (Lippman, C.J., dissenting).

¹³⁸ *Id.* at 293-94, 952 N.E.2d at 1020, 929 N.Y.S.2d at 28 (emphasis added) (citations omitted) (quoting *Zeran v. Am. Online*, 129 F.3d 327, 330 (4th Cir. 1997)).

piece by the editor's notes, including the statement: "[A]nd now it's time for your weekly dose of hate' and 'for the record, we are **so. not. afraid.**"¹³⁹

The dissent stated that the "majority is anxious to trivialize the religiously charged illustration."¹⁴⁰ The dissent agreed with the majority that "a reasonable reader would not have gathered . . . that defendants were asserting that plaintiff was in fact Jesus Christ or the king of 'token' Jewish real estate agents."¹⁴¹ But the dissent wrote that "a reasonable reader, viewing the heading and illustration, might very well have concluded that the site editor was endorsing the truth of the appended facts, which asserted that plaintiff was an anti-Semite who employed a single Jewish realtor in order to maintain business with Jewish landlords."¹⁴² According to the dissent, "defendants' attachment of this illustration . . . should alone defeat their immunity under the CDA" because "a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct."¹⁴³

Chief Judge Lippman made it clear that the dispute with the majority was not over the law, but was on the facts. "Like the majority, I accept the 'national consensus' on statutory immunity under the CDA.¹⁴⁴ However, I see no basis in the record for the majority's confident conclusion that defendants served only as a passive conduit of this defamatory material, and are therefore immune as a matter of law."¹⁴⁵

He concluded that:

While I do not dispute the adoption of a broad approach to immunity for on-line service providers under the CDA, an interpretation that immunizes a business's complicity in defaming a direct competitor takes us so far afield from the purpose of the CDA as to make it unrecognizable. Dismissing this action on the pleadings is not required by

¹³⁹ *Id.* at 294, 952 N.E.2d at 1020–21, 929 N.Y.S.2d at 28–29 (emphasis in original) (internal quotation marks omitted).

¹⁴⁰ *Id.* at 294, 952 N.E.2d at 1021, 929 N.Y.S.2d at 29.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* (other citations omitted) (quoting Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1168 (9th Cir. 2008)).

¹⁴⁴ *Shiamili*, 17 N.Y.3d at 295, 952 N.E.2d at 1021, 929 N.Y.S.2d at 29 (quoting *id.* at 288, 952 N.E.2d at 1017, 929 N.Y.S.2d at 25 (majority opinion)).

¹⁴⁵ *Id.* at 295, 952 N.E.2d at 1021, 929 N.Y.S.2d at 29 (Lippman, C.J., dissenting).

the letter of the law and does not honor its spirit.¹⁴⁶

VI. CONCLUSION

The Court of Appeals' split decision in *Shiamili* is an excellent example of what appears to be the primary lessons from the fifteen years of internet defamation law in New York summarized here. Three themes emerge from these cases.

First, the traditional mass media rules are being applied and, if anything, are being applied more vigorously in internet defamation cases. Obviously, plaintiffs hoped that the internet was so different that New York's courts might relax the traditional rules that already provided substantial protection to traditional, mass media publishers sued for defamation or develop new legal principles for internet defamation claims that would provide less protection for internet publishers, many of whom are and remain anonymous. That has not been the case. Moreover, the new protection provided by Congress, the CDA, has been given a broad and liberal interpretation to further protect ISPs from defamation claims in New York.

Second, as a result, plaintiffs did not succeed in any of the cases summarized here—in fact, none of them even made it to trial. Defamation claims were already, in this author's opinion, one of the two or three most difficult civil claims on which to succeed, but internet defamation claims appear to be even more arduous to prosecute.

Third, just like traditional mass media defamation cases, internet defamation claims are difficult to adjudicate and usually it is the facts that make them so. This is clearly reflected in the 4–3 decisions in *SPCA of Upstate New York* and *Shiamili*.

Internet defamation cases are increasing and will certainly produce more interesting appellate decisions that will continue to develop this emerging area of law in New York.

¹⁴⁶ *Id.* at 295, 952 N.E.2d at 1022, 929 N.Y.S.2d at 30.