

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
Roy Den Hollander,

Plaintiff,

Docket No. 16-cv-9800 (VSB)
(ECF)

-against-

Katherine M. Bolger, and
Matthew L. Schafer,

Defendants.
-----X

**Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to
Strike or Dismiss under Fed. R. Civ. P. 12(f) and 12(b)(6)**

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Table of Contents

FACTS..... 1

ARGUMENTS..... 2

I. The preponderance of the evidence without the availability of discovery is that the MensRightsLaw.net website was private—not public..... 2

 A. Web Archives and Caches..... 2

 B. Battling Affidavits..... 9

 C. Logical inferences..... 10

 D. Resolution..... 10

II. Courts disfavor Rule 12(f) motions to strike pleadings..... 12

III. The plausibility standard for a Fed. R. Civ. P. 12(b)(6) motion to dismiss..... 17

 A. The Second Amended Complaint adequately alleges that Defendants violated CFAA 18 U.S.C. § 1030(a)(2)(C) causing loss under § 1030(e)(11)..... 18

 B. The Schafer screenshot and Google-cache and the Bolger cache contained copyrighted material that Defendants reproduced, distributed and displayed without Plaintiff’s authorization; thereby, infringing Plaintiff’s registered-copyrights..... 20

 1. The Schafer screenshot and Google-cache and the Bolger cache contained registered-copyrighted material..... 20

 2. Defendants infringed by reproducing, distributing and displaying the Schafer screenshot, Google-cache and Bolger cache without Plaintiff’s authorization..... 21

IV. Collateral Estoppel does not apply..... 23

V. Sanctions..... 24

CONCLUSION..... 25

Table of Authorities

CASES

A.V. v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009)..... 19

Agee v. Paramount Communs., 59 F.3d 317 (2d Cir. 1995)..... 23

Arista Records LLC v. Doe, 604 F.3d 110 (2d Cir. 2010) 18 n.7

Arista Records, Inc. v. Mp3Board, Inc., 2002 WL 1997918 (S.D.N.Y. 2002)..... 23

Ashcroft v. Iqbal, 556 U.S. 662 (2009)..... 17, 18

Avon Pub. Co. v. American News Co., 122 F.Supp. 660 (S.D.N.Y. 1954)..... 14

Bain v. Cotton, 2009 WL 1660051 (D. Vt. 2009)..... 13

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)..... 18

Burke v. ITT Automotive, Inc., 139 F.R.D. 24 (N.Y.W.D. 1991) 13

Crespo v. N.Y.C. Transit Auth., 2002 WL 398805 (E.D.N.Y. Jan. 7, 2002) 15

Daggs v. Periodical Publishers’ Serv. Bureau, Inc., 36 F.R.D. 48 (D. Conn. 1964)..... 14

Day v. Moscow, 955 F.2d 807 (2d Cir. 1992)..... 12

Einhorn v. Mergatroyd Prods., 426 F.Supp. 2d 189 (S.D.N.Y. 2006) 23

Facebook, Inc. v. Power Ventures, Inc., 844 F.3d 1058 (9th Cir. 2016) 19

Federated Dep’t Stores, Inc. v. Grinnell Corp., 287 F.Supp. 744 (S.D.N.Y. 1968) 14

Fleischer v. A. A. P., Inc., 180 F.Supp. 717 (S.D.N.Y. 1959) 14

Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 402 F.Supp. 636 (S.D.N.Y. 1975) 15

Gleason v. Chain Serv. Restaurant, 300 F.Supp. 1241 (S.D.N.Y. 1969), *affirmed on other grounds*, 422 F.2d 342 (2d Cir. 1970)..... 14

Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) 21

Hayden v. Paterson, 594 F.3d 150 (2d Cir. 2010)..... 17, 18

Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey, 497 F.Supp. 2d 627 (E.D. Pa. 2007)..... 20

Hickman v. Taylor, 329 U.S. 495 (1947)..... 6, 18 n.7

Hollander v. Shepherd, et al., 152656/2014 (N.Y. Sup. Ct.)..... 1, 10, 12

Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199 (4th Cir. 1997)..... 23

In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677 (2d Cir. 2009) 18

In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig., 2013 WL 6869410 (S.D.N.Y. Dec. 30, 2013), *vacated on other grounds*, 2015 WL 9777725 (2015) 7

Ipreo Holdings LLC v. Thomson Reuters Corp., 2011 WL 855872 (S.D.N.Y. Mar. 8, 2011)..... 20

Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007), *rev'd sub nom. on other grounds*, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). 18

John G. Danielson, Inc. v. Winchester-Conant Props., Inc., 322 F.3d 26 (1st Cir. 2003) 22

Kramer v. Time Warner, Inc., 937 F.2d 767 (2d Cir.1991)..... 15

Lennon v. Seaman, 63 F.Supp. 2d 428 (S.D.N.Y. 1999) 15

Lewis v. Shaffer Stores Co., 218 F.Supp. 238 (S.D.N.Y. 1963).....17

Lipsky v. Commonwealth United Corp., 551 F.2d 887 (2d Cir. 1976). 15

Manard v. Hardware Mutual Casualty Co., 12 A.D.2d 29 (4th Dept. 1960)..... 24

Martins v. 3PD, Inc., 2013 WL 1320454 (D. Mass. Mar. 28, 2013)..... 7

McLaren v. Chico's FAS, Inc., 2010 WL 4615772 (S.D.N.Y. Nov. 9, 2010) 23

Nexans Wires S.A. v. Sark- USA, Inc., 319 F.Supp. 2d 468 (S.D.N.Y. 2004) 20

NOW, Inc v. Scheidler, 510 U.S. 249 (1994)..... 6, 18 n.7

OTG Brands, LLC v. Walgreen Co., 2015 WL 1499559 (S.D.N.Y. Mar. 31, 2015) 15

Pond Guy, Inc. v. Aquascape Designs, Inc., 2014 WL 2863871 (E.D. Mich. June 24, 2014)..... 7

SEC v. Toomey, 866 F.Supp. 719 (S.D.N.Y. 1992) 14

Taveras v. Morales, 22 F.Supp. 3d 219 (S.D.N.Y. 2014)..... 15

Torres v. New York Methodist Hosp., 2016 WL 3561705 (E.D.N.Y. Jan. 7, 2016)..... 15

Univ. Sports Pub. Co. v. Playmakers Media Co., 725 F.Supp. 2d 378 (S.D.N.Y. 2010)..... 19

UPS Store, Inc. v. Hagan, 99 F.Supp. 3d 426 (S.D.N.Y. 2015)..... 14

Velez v. Lisi, 164 F.R.D. 165 (S.D.N.Y. 1995)..... 14

VNB Realty, Inc. v. Bank of Am. Corp., 2013 WL 5179197 (S.D.N.Y. Sept. 16, 2013) 14

von Bulow by Auersperg v. von Bulow, 657 F.Supp. 1134 (S.D.N.Y. 1987) 17

Zabriskie v. Zoloto, 22 A.D.2d 620 (1st Dep’t 1965)..... 23

STATUTES

17 U.S.C. § 101..... 22

17 U.S.C. § 106 (1), (3), (5)..... 1, 21

17 U.S.C. § 107(2) 21

17 U.S.C. § 501(a) 1

18 U.S.C. § 1030(a)(2)(C), 1, 18

18 U.S.C. § 1030(e)(11)..... 1, 18, 19, 20

18 U.S.C. §1030(g)..... 1

28 U.S.C. § 1338(a) 24

RULES

Fed. R. Civ. P. 12(b)(6)..... 17, 20

Fed. R. Civ. P. 12(f)..... 12, 14, 15

Second Circuit Local Rule 32.1.1 23 n.8

TREATISES

Ian C. Ballon, *E-Commerce and Internet Law* § 44.11 (2d ed. 2016)..... 16

Nimmer on Copyright § 4.07 (2001)..... 22

Prof. Schechter & Prof. Thomas, *Intellectual Property: The Law of Copyrights, Patents and Trademarks* § 5.1 (2003)..... 22

Patry on Copyright § 13:11 (2015)..... 23

Wright & Miller, 5C Fed. Prac. & Proc. Civ. § 1380 (3d ed.)..... 12, 15

Wright & Miller, 5C Fed. Prac. & Proc. Civ § 1382 (3d ed.)..... 14 n.6

Other Authorities

Archive .org, *Frequently Asked Questions*, [https://archive.org/about/ faqs.php#The_Wayback Machine](https://archive.org/about/ faqs.php#The_Wayback_Machine)..... 4, 5

Copyright Act, House Report No. 94-1476, p. 138, Sept. 3, 1976; 94th Cong., 2nd Sess. 1976, 1976 U.S.C.C.A.N. 5659, 5754..... 22

Gail Truman, *Harvard Library Report*, January 2016..... 2, 3

Jill Lepore, *Can the Internet be archived?*, New Yorker-The Cobweb, January 26, 2015 3, 4, 4 n.3, 8

Kalev Leetaru, *The Internet Archive Turns 20: A Behind The Scenes Look At Archiving The Web*, Forbes, January 18, 2016..... 4, 7

National Digital Stewardship Alliance, *Web Archiving in the U.S.: A 2013 Survey*, September 2014..... 8

NetCraft and Internet Live Stats 5

Scott G. Ainsworth, Ahmed AlSum, Hany SalahEldeen, Michele C. Weigle, Michael L. Nelson, *How Much of the Web Is Archived?*, Old Dominion University, Norfolk, Virginia, January 6, 2013 3, 8

Search Engine Showdown, *Finding Old Web Pages and Cache Copies*, March 26, 2013 8

The Internet Society, *RFC 3986—Uniform Resource Identifier: Generic Syntax*, January 2005.. 3

FACTS

While representing a Rupert Murdoch newspaper in an action in the New York State Supreme Court, *Hollander v. Shepherd, et al.*, 152656/2014 (N.Y. Sup. Ct.) (the “Murdoch Case”), Defendants Bolger and Schafer, two attorneys, or one of their agents allegedly hacked into Plaintiff’s private website MensRightsLaw.net, which is referred to in the Second Amended Complaint as the “iCloud.” Inside, Defendants or their agent stripped the access codes in order to make the website viewable to the public. Defendants downloaded or copied from the site a document titled “Responses to Media” (Def. Strike Mem. Ex. G-1, Dkt. 66-7) and Defendant Schafer made a screenshot of part of the homepage and reproduced a Google-cache of the site’s homepage (Def. Strike Mem. Ex. H-1, 2, Dkt. 66-8). Schafer’s screenshot and the Google-cache contained material copyrighted by Plaintiff and both were reproduced without Plaintiff’s authorization. Also during the Murdoch case, Bolger reproduced without Plaintiff’s permission a cache of the registered-copyrighted work “roydenhollander.com” in her “Affirmation Supporting Second Motion to Dismiss” at ¶ 17 citing to Ex. 16, *Hollander v. Shepherd, et al.*, 152656/2014, Dkts. 45 and 46. (Ex. A). Defendants communicated the Schafer screenshot, Google-cache, “Responses to Media” and the Bolger cache to their clients and made them public by filing them on the New York Supreme Court’s *WebCivil* site.

Defendants Bolger and Schafer’s actions constitute the intentional deprivation of and interference with Plaintiff’s rights under the Computer Fraud and Abuse Act of 1986 (“CFAA”), 18 U.S.C. §§ 1030(a)(2)(C), 1030(e)(11), 1030(g), and the Copyright Act of 1976, 17 U.S.C. §§ 106(1), (3) & (5) and 17 U.S.C. § 501(a).

On February 21, 2018, this Court issued an Order, Dkt. 43 at 1:

With respect to Plaintiff’s claims filed pursuant to the Computer Fraud and Abuse Act (“CFAA”), 18 U.S.C. § 1030(a)(2)(C), and the Copyright Act, 17

U.S.C. § 501(a), Plaintiff’s claims are dismissed without prejudice, and I grant Plaintiff leave to amend the FAC as to these claims.”¹

ARGUMENTS

I. The preponderance of the evidence without the availability of discovery is that the MensRightsLaw.net website was private—not public.

The preponderance of the evidence shows that the website MensRightsLaw.net (referred to in the Second Amended Complaint (“SAC”) as “iCloud”) was created as a private site—not viewable by the public—in September 2012. MensRightsLaw.net (“MRL.net”)² continued as a private website requiring codes to access it until on or about December 30, 2014, when Defendants or their agent hacked into the site and eliminated the access codes to make it public. From late in the day on January 12, 2015, to the present, MRL.net has remained private.

A. Web Archives and Caches

Libraries and other organizations have been preserving the written history of mankind since at least the Royal Library of Alexandria in 330 B.C. by storing clay tablets, papyrus scrolls, books and pictures. Over the past 20 years, much of our history has been recorded in digital form and preserved by archiving. “Today’s research libraries and archives recognize website archiving (‘web archiving’) as an essential component of their collecting practices, and various programs to archive portions of the Web have been developed around the world, from within national archives to individual institutions.” Gail Truman, *Harvard Library Report*, January 2016, at 5 (Harvard Library sponsored an environmental scan to explore and document current web archiving programs.).

Web archives send out software applications called “robots” that run an automated task called “crawling” over the Internet to take pictures of publicly available web pages at a particular

¹ Defendants are represented in this case by attorney Joseph L. Francoeur (“Francoeur”). Some of his misrepresentations are corrected in Exhibit B.

² MRL.net includes <http://www.mensrightslaw.net> and <http://www.mensrightslaw.net/main/index.html>.

point in time. *See* Scott G. Ainsworth, Ahmed AlSum, Hany SalahEldeen, Michele C. Weigle, Michael L. Nelson, *How Much of the Web Is Archived?* at 1, 7, 8, Old Dominion University, Norfolk, Virginia, January 6, 2013. Some web archives are limited to specific subject matters while others are not. *See Harvard Library Report* at 48-77 (sample list of web archives); Jill Lepore, *Can the Internet be archived?* at 13, *New Yorker-The Cobweb*, January 26, 2015 (Lepore is a staff writer and a professor of history at Harvard University).

So how much of the publicly available web had been archived and did any of the relevant archives record the MRL.net homepage before Defendants Bolger and Schafer or their agent stripped the site of its access codes on or about December 30, 2014?

The Old Dominion University's statistical study found that 35% to 90% of the Web's publicly-visible Uniform Resource Identifiers ("URI") had at least one archived copy available in public archives such as the Internet Archive. *How Much of the Web Is Archived?* at 1. A URI identifies a resource, which is a source of information with a consistent purpose, such as a website. Internet Society, *RFC 3986—Uniform Resource Identifier: Generic Syntax* at 5, January 2005. A URI distinguishes "one resource from all other resources." *Id.* at 5. URIs are used to denote a resource of data but not how to find it on the Web. *Id.* at 5, 6. The term "Uniform Resource Locator" ("URL") refers to the means for locating a resource by describing its primary access mechanism; that is, its Web location. *Id.* at 7. In this case the URI identifier of the unique resource is "http://MensRightsLaw.net" while the URL map to the homepage that Schafer made a screenshot of is "/main/index.html." The identifier and homepage address together are <http://MensRightsLaw.net/main/index.html>. The use of capital letters is irrelevant. They are simply used here to highlight the site's name.

Applying the Old Dominion study to <http://MensRightsLaw.net>, if it were publicly

available as Defendants Bolger and Schafer allege without any interference by them, then there would be a 35% to 90% chance it would have been archived prior to December 30, 2014, when Defendants assert they first accessed the site.

The web archive with the most extensive records of websites from when MRL.net was created in September 2012 until the present is the Wayback Machine operated by the Internet Archive. “Since September 10th, 2010, the Internet Archive has been running Worldwide Web Crawls of the global web, capturing web elements, pages, sites and parts of sites.” Kalev Leetaru, *The Internet Archive Turns 20: A Behind The Scenes Look At Archiving The Web* at 3, Forbes, January 18, 2016 (quoting Mark Graham, Director of the Wayback Machine). “[T]he Wayback Machine is so much bigger than all of [the other web archives] that it’s very nearly true that if it’s not in the Wayback Machine it doesn’t exist.” *Can the Internet be archived?* at 2.

Besides the Internet Archive’s Wayback Machine and Archive-It³, there are “a handful of fledgling commercial enterprises, and a growing number of university Web archives, most Web archives are run by national libraries.” *Id.* at 8. The national libraries “collect chiefly what’s in their own domains” while many use the Wayback Machine, such as the Library of Congress, the British Library and the Bibliothèque Nationale de France. *Id.* at 8.

The Wayback Machine only “collects web pages that are publicly available.” Archive .org, *Frequently Asked Questions*, https://archive.org/about/faqs.php#The_Wayback_Machine. “The Wayback Machine collects every Web homepage page it can find, unless that page is blocked.” *Can the Internet be archived?* at 9. The Wayback Machine does “not archive pages that require a password to access” or “otherwise inaccessible to our automated systems.”

Archive .org, *Frequently Asked Questions*, https://archive.org/about/faqs.php#The_Wayback

³ Archive-It.org allows individuals and institutions to build their own archives, and a copy of everything they save also goes into the Wayback Machine. *Can the Internet be archived?* at 7.

_Machine. “Pages may not be archived due to robots [or page META robots]⁴ exclusions, some sites are excluded by direct site owner request.” An orphan homepage, fillable forms, SSL encryption, or a homepage’s need to contact the originating server in order to work would interfere with capturing a page. *Id.* Dynamic web pages in JavaScript also interfere with the Wayback Machine’s copying while static web pages in simple html are the easiest to store. *Id.*

MRL.net required password access because it was a private site, so the Wayback Machine could not make a copy of its homepage at any time from the date of its creation in September 2012 to on or about December 30, 2014, when Defendants had the access codes stripped. As the affidavits of Plaintiff and his computer consultant attest, none of the other reasons for the Wayback Machine’s failure to copy its homepage applied from its creation to the present. (Ex. C and Ex. D).⁵ The logical inference is that MRL.net was not publicly available.

The “Wayback Machine is based on an index built by evaluating terms from hundreds of billions of links to publicly available homepages of more than 350 million sites.” Archive.org, *Frequently Asked Questions*, https://archive.org/about/faqs.php#The_Wayback_Machine. From 2012 to 2014, there were 700 million to one billion websites, *NetCraft and Internet Live Stats* (elaboration of data by Matthew Gray of MIT and Hobbes’ Internet Timeline and Pingdom), <https://www.internetlivestats.com/total-number-of-websites>. Therefore, there was around a 35% to 50% chance that the Wayback Machine would have crawled MRL.net and archived it—if it were public. There was also a 35% to 50% chance that the Wayback Machine would have crawled it but not archived it because MRL.net was not public. This does not prove that MRL.net was private during the relevant time frame, but it sure provides a statistical basis for the

⁴ These are programs on a website that instructs a web crawler program, such as the Wayback Machine, not to scan the site or parts of the site.

⁵ Plaintiff’s computer consultant executed his affidavit in Marseille, France. No doubt Francoeur will now accuse him of being part of the *French Connection*, just as he previously falsely accused him of being Russian.

plausible allegation that it was private. This is especially true given that on a motion to dismiss, Plaintiff should not be put to the test to prove his allegations. *NOW, Inc v. Scheidler*, 510 U.S. 249, 256 (1994); *Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947). Further, it also provides a basis for discovery as explained in the SAC ¶¶ 12, 13, 16, 61, 62, 63, 77, 78.

The Wayback Machine (<https://archive.org/web/>) allows a person to search for a website or web page. The search brings up the available records for a particular date. The results for “<http://www.mensrights law.net>” and “<http://www.mensrightslaw.net/main/index.html>” show the Wayback has no records for 2014 and before. Since MRL.net was password protected until Defendants allegedly hacked in and stripped the codes, the Wayback Machine could not archive the site or its homepage when crawled—assuming it was crawled for which there is a 35% to 50% probability. From on or about December 30, 2014, to January 12, 2015, MRL.net was publicly available, but on January 12, 2015, password protection was reinstated (Ex. E ¶¶ 11-13; SAC ¶ 88). After January 12, 2015, to the present, the Wayback Machine shows hits for both the website and homepage. (Exs. F & G). The hits—indicated by vertical lines on the top year calendar and blue or orange circles on the month and day calendar below—occurred after Defendants or their agent allegedly made MRL.net public by stripping its access codes. After that brief period of involuntary public access, the Wayback Machine hits state, “401-Unauthorized: Access is denied due to invalid credentials,” which means a password is required to access the website or homepage.

For the period of time after Defendants allegedly made MRL.net public, the Wayback Machine also states under “About this capture” that “[t]he WARC [or stored web crawl] files associated with this crawl are not currently available to the general public.” (Exs. F & G). Such indicates that the Internet Archive has other files concerning MRL.net. “Only a portion of what

the Archive crawls or receives from external organizations and partners is made available in the Wayback Machine [T]he Archive is even more similar to traditional archives in its use of a dark archive in which only a portion of its holdings are publically accessible” Kalev Leetaru, *The Internet Archive Turns 20: A Behind The Scenes Look At Archiving The Web* at 4-5, Forbes, January 18, 2016. Without discovery, any such files from before and after the alleged hacking will remain hidden. One would think that Defendants would want access to such files to show MRL.net was, as they assert, public, but they have made clear their opposition to discovery. Perhaps they fear the files will show that MRL.net was crawled by the Wayback Machine before December 30, 2014, but it could not capture the site or homepage because they were private. Other Internet Archive information will also remain hidden, such as why the Wayback recorded the “access is denied” after Defendants made MRL.net public for two weeks. Something only the Internet Archive knows.

Numerous courts have taken judicial notice of the data collected by the Internet Archive on its Wayback Machine. *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 2013 WL 6869410 *4 n.65 (S.D.N.Y. Dec. 30, 2013), *vacated on other grounds* 2015 WL 9777725 (2015) (taking judicial notice of certain reports by way of an Internet Archive search); *Pond Guy, Inc. v. Aquascape Designs, Inc.*, 2014 WL 2863871, at *4 (E.D. Mich. June 24, 2014) (“[T]he Court turns to the Internet Archive, found at <https://archive.org/web/>, for the taking of judicial notice. As a resource the accuracy of which cannot reasonably be questioned, the Internet Archive has been found to be an acceptable source for the taking of judicial notice” to determine history of Internet presence); *Martins v. 3PD, Inc.*, 2013 WL 1320454, at *16 n.8 (D. Mass. Mar. 28, 2013) (taking judicial notice of “the various historical versions of a website available on the Internet Archive at Archive.org as facts readily determinable by resort to a source whose

accuracy cannot reasonably be questioned”).

In addition to the Wayback Machine of which 89% of respondents in a survey said they used (National Digital Stewardship Alliance, *Web Archiving in the U.S.: A 2013 Survey*, at 20 September 2014) Plaintiff searched 24 other web archive data bases that scan for public websites. These archives had no listings for MRL.net or they referred to the Internet Archive’s Wayback Machine or its Archive-It. This also infers that MRL.net was not publicly available when Defendants assert it was. (Ex. D).

For example, “Memento allows you to say, ‘I don’t want to see this link where it points me to today; I want to see it around the time that this page was written.’” *Can the Internet be archived?* at 14 (quoting Herbert Van de Sompel, computer scientist at the Los Alamos Laboratory). Memento “searches not only the Wayback Machine but also every major public web archive in the world, to find the page closest in time to the time you’d like to travel to.” *Can the Internet be archived?* at 14.

Another way to determine whether MRL.net was publicly viewable is whether any Internet services, such as search engines, recorded a “cached” version of a page from the site. Caches provide good coverage of publicly available webs. *How Much of the Web Is Archived?* at 7. During the period from September 2012 to the end of 2014, there were around 10 services or search engines that provided caches. Search Engine Showdown, *Finding Old Web Pages and Cache Copies* at 2-3, March 26, 2013. Defendants have only provided one cache of MRL.net from Google and that cache was taken on January 3, 2015, after they allegedly made MRL.net public by stripping the codes and before a password was again attached to keep it private. (Def. Strike Mem., Ex. H-2, Dkt. 66-8). The only thing the Google-cache shows is that MRL.net was public on January 3, 2015—it does not show that it was public on December 30, 2014, when

Defendants admit accessing the site and allege it was public. (Def. Strike Mem., Exs. G and H, Dkts. 66-7, 66-8). Had MRL.net been public during Defendants searching of the web in the Murdoch Case from at least July 14, 2014, to December 30, 2014, when they claim to first access the site; their searching would have easily turned up numerous caches of MRL.net, which they would have produced—they did not. (SAC ¶¶ 55-59). The reason is simple—the site was private, so there were no caches from before they stripped the access codes.

B. Battling Affidavits

Following the February 16, 2018, hearing, Plaintiff, an attorney, submitted an affirmation (Ex. E) and his computer consultant submitted two affidavits (Exs. H, I). Francoeur falsely asserts the consultant's affidavits are only in Russian when both have a properly notarized and apostilled English translation. Francoeur also ignores the second affidavit (Ex. I) that states:

Whenever I [French consultant] needed to access the site [MRL.net] at Mr. Roy Den Hollander's instructions to upload a video or audio recording or make a change, the site was private and could not be viewed by the public. The last time I uploaded a video to the site was the beginning of 2017, the site was private and protected by access codes and up to the present the site still continues to be private and protected by access codes.

Both Plaintiff and consultant have sworn that when MRL.net was created, it was a private website protected from public viewing by access codes, and that whenever accessing the site subsequently, required access codes to view it on the Internet. (Exs. E, H, I). Until January 12, 2015, that is, when Plaintiff discovered that Defendants had accessed the site. A new password was immediately applied and MRL.net remains private to the present day. Defendants' affidavits assert the site was public when they accessed it from December 30, 2014, to January 12, 2015, and neither they nor to their knowledge did anyone hack into it. Looks like a tie, which is why Francoeur tries to keep evidence from the Court by falsely asserting that the only documentation the Court should permit must come from the MRL.net host, even though the

Plaintiff and his computer consultant's sworn statements are admissible evidence and the host leaves it up to the site creator and owner to make a site private or public (Ex. E at ¶¶ 15-19).

C. Logical inferences

Defendants, or one of their agents, were searching the Internet in the Murdoch Case beginning at least on July 14, 2014 (SAC ¶ 55) for information on Plaintiff. Why did it take them over five months to access MRL.net if it were open to the public all that time? Had MRL.net been open to the public, Defendants would have included the "Responses to Media" document from the website in their first set of exhibits on August 29, 2014 (*Hollander v. Shepherd*, 152656/2014, Dkt. 9), or their second set of exhibits on October 27, 2014 (Dkt. 46), or in their reply on November 13, 2014 (Dkt. 68), or in oral argument before Justice Tingling on November 24, 2014 (*Hollander v. Shepherd*, 152656/2014, Appearances)—but they did not.

Plaintiff learned early on in the Murdoch Case from the Internet exhibits Bolger filed on August 29, 2014, that she and others from her firm or clients were trolling the Web for anything she could spin to support her strategy of vilification. If MRL.net was public, why would Plaintiff keep it public knowing that Defendants were searching for information to further their litigation by personal destruction? He would not. Another logical question is what man, not to mention a lawyer, in this day and age of political correctness would ever post online the "Responses to Media" for public viewing—no man. It would not only obviate the very purpose of an attorney work product but also start up the machine of self-righteous outrage and demonization to destroy his career and possibly his life.

D. Resolution

The parties' sworn statements provide evidence MRL.net was private and evidence it was public—so that's a wash. Internet archiving and caching provides evidence that MRL.net was

private. Logical inferences as to the actions of attorneys, both Plaintiff and Defendants, provide evidence that MRL.net was private. All three taken together, provides a preponderance of evidence that the site was private, but an impartial decision maker might conclude it a tossup. So the only resolution is through discovery. (*See* SAC ¶¶ 12-13, 16-17, 60-63, 77-79, 94).

Defendants also assert that because the Columbia Business School Alumni Club of New York website listed MRL.net that by clicking on it accessed the site. (Def. Strike Mem. Ex. F at 5, Dkt. 66-6). But Defendants do not produce any evidence or even say what happened when they first or subsequently clicked on MRL.net, which they most assuredly did. If the homepage had appeared, they would have said so and copied it—but they say nothing and present nothing. If after clicking, the message came up “page not found,” which is what the SAC ¶ 60 states, they may have actually copied or downloaded that “page not found.” Discovery would reveal exactly what they did when they first or subsequently clicked on the Columbia listing. If nothing happened, then it infers MRL.net was private. Defendants do not say when or how often they visited the Columbia website, except for “last visited Feb. 3, 2015.” (Def. Strike Mem. Ex. F at 5, Dkt. 66-6). And even then, they do not say what happened when MRL.net was clicked.

For any materials Defendants printed or downloaded from the Columbia Alumni site or MRL.net, the printer-markings or embedded computer information in a download would indicate the date and time of access as well as the source. If their access attempts were before December 30, 2014, and failed, then that infers they were unsuccessful because MRL.net was private.

Defendant Schafer swears he “first located” MRL.net on December 30, 2014, and Defendant Bolger swears she was “first” required to enter a password on January 13, 2015. (Def. Strike Mem. Ex. H at ¶ 2, Ex. G at ¶ 6). Defendants or their agent’s Internet Service Provider (“ISP”) tracks everything they do online because every click creates a browsing history

that in the regular course of ISP businesses is sold to marketers. Defendants' ISP logs will show when they first located MRL.net, attempted to access it and when a password was required. The logs will also show how many times they contacted it and for how long. If their first contact was before 9:48 am on December 30, 2014 (time of the Schafer screenshot), it infers they were unable to access it; otherwise, they would have duplicated materials then. If their first contact was on the date and time sworn to, the ISP records pertaining to that contact will indicate whether they were able to access MRL.net by the time they spent viewing it. If they were unable to access MRL.net whenever they first located it, that means they or an agent subsequently broke in and stripped the codes; otherwise, they would have duplicated the site's materials when first located.

Defendants have also avoided admitting when they started searching Google-caches for information on Plaintiff. For example, Bolger copied a cache of the registered-copyrighted work "roydenhollander.com" that she filed October 27, 2014. (Ex. A, *Hollander v. Shepherd*, 152656/2014, Bolger Affirmation ¶ 17, Ex. 16, Dkt. 45 & 46)). This proves they were searching for caches well before the January 3, 2015, Google-cache they assert is evidence that MRL.net was public. (Def. Strike Mem. Ex. H-2, Dkt. 66-8). Defendants, however, provide no earlier caches for MRL.net because caches can only copy public websites and MRL.net was not public before Defendants had the access codes stripped.

II. Courts disfavor Rule 12(f) motions to strike pleadings.

"As the cases make clear, it is neither an authorized nor a proper way to procure the dismissal of all . . . of a complaint" by using a Rule 12(f) motion. *Wright & Miller*, 5C *Fed. Prac & Proc. Civ.* § 1380 at 1 (3d ed.); *see Day v. Moscow*, 955 F.2d 807, 811 (2d Cir. 1992) ("not for dismissal of claims in their entirety"). Despite this policy, Francoeur requests the entire

SAC be stricken asserting Plaintiff violated this Court's ruling. (Def. Strike Notice at 1, Mem. at 1, 2, 8-10). The cases cited by Francoeur are not on point. (Def. Strike Mem. at 8-9, Dkt. 67). In *Bain v. Cotton*, 2009 WL 1660051, *2-3 (D. Vt. 2009), the court rejected a prisoner's amended complaint for adding five more defendants and a previously disallowed claim. The SAC complies with this Court's Order at 1, February 21, 2018, Dkt. 43, for as required, there are no RICO, replevin, trespass to chattels or injurious falsehood claims. In *Burke v. ITT Automotive, Inc.*, 139 F.R.D. 24, 37 (N.Y.W.D. 1991), the court struck defendant's answer for failure to produce documents pursuant to a discovery order. Such is not the case here.

Francoeur falsely asserts that at the February 16, 2018, hearing, the Court ordered that Plaintiff provide an affidavit from the MRL.net host. (Def. Strike Mem. at 10). This is the second time Francoeur made this misrepresentation to the Court. The first was Francoeur's March 19, 2018, letter to the court on page 2, Dkt. 55. Then as now, there was nothing at the February 16, 2018, hearing about Plaintiff obtaining an affidavit from the MRL.net host:

Either documentation from the company that shows that you basically had this storage and that it was something that was not accessible to the public. It may be that if you're correct that they are unable to tell you that, well, then see if you can get some documentation that reflects that. (Tr. 60:3-8).

Francoeur's strategy is clear—keep the truth hidden by any means possible. He is basically asking this Court to ignore sworn statements of the computer consultant who set up and maintains MRL.net, ignore the same from Plaintiff who commissioned and uses the site, and ignore the Wayback Machine and other web archives that have no records of MRL.net because it was private. Victory is easy when pertinent evidence is ignored even though it is admissible.

Francoeur also asserts that the SAC allegations are immaterial, prejudicial and irrelevant. (Def. Strike Mem. at 11-13). “[I]t is settled law in this District [S.D.N.Y.] that ‘immaterial allegations . . . need not be stricken unless their presence in the complaint prejudices the

defendant.” *Federated Dep’t Stores, Inc. v. Grinnell Corp.*, 287 F.Supp. 744, 747 (S.D.N.Y. 1968) (internal quote *Fleischer v. A. A. P., Inc.*, 180 F.Supp. 717, 721 (S.D.N.Y. 1959)). The prejudice to be protected against by a Rule 12(f) motion is “that which may be suffered if the jury sees the complaints” *Federated Dep’t Stores, Inc.* at 748. The challenged allegations in the SAC will not be provided to a jury because “such is not the practice in this District.” *Id.* at 748 (citing *Avon Pub. Co. v. American News Co.*, 122 F.Supp. 660, 662 (S.D.N.Y. 1954)).

If this Court is concerned over whether any of the allegations in the SAC may slip-in and cause prejudice in the minds of the jurors, then Plaintiff is willing to withdraw his request for a jury trial and go with a bench trial instead. Where a “case will be tried to the Court [] [n]o prejudice will result to the defendant if the allegedly offending allegations are permitted to remain in the Complaint.” *Daggs v. Periodical Publishers’ Serv. Bureau, Inc.*, 36 F.R.D. 48, 49 (D. Conn. 1964) (*ad hominem* characterizations, verbosity and redundant and impertinent terminology were not stricken). In *Gleason v. Chain Serv. Restaurant*, 300 F.Supp. 1241, 1260, (S.D.N.Y. 1969), *affirmed on other grounds*, 422 F.2d 342 (2d Cir. 1970), the Court held that “Defendants have not demanded a trial by jury. Therefore, there is no factor of possible prejudice in the minds of a jury implanted by allegedly scandalous allegations in a complaint.”⁶

Courts generally disfavor striking allegations in a pleading. *SEC v. Toomey*, 866 F.Supp. 719, 722 (S.D.N.Y. 1992). “[S]triking a portion of a pleading is a drastic remedy and is therefore disfavored.” *UPS Store, Inc. v. Hagan*, 99 F.Supp. 3d 426, 442 (S.D.N.Y. 2015) (quoting *VNB Realty, Inc. v. Bank of Am. Corp.*, 2013 WL 5179197 at *2 (S.D.N.Y. Sept. 16, 2013)). The Rule 12(f) motion has been termed an “extraordinary remedy.” *Velez v. Lisi*, 164 F.R.D. 165, 166 (S.D.N.Y. 1995). “Both because striking a portion of a pleading is a drastic

⁶ “It is not enough that the matter offends the sensibilities of the objecting party if the challenged allegations describe acts or events that are relevant to the action.” Wright & Miller, *5C Fed. Prac. & Proc.*, § 1382 at 4.

remedy and because it often is sought by the movant simply as a . . . harassing tactic, numerous judicial decisions make it clear that motions under Rule 12(f) are viewed with disfavor by the federal courts” *Wright & Miller, 5C Fed. Prac. & Proc. Civ.* § 1380 at 2.

“[M]otions to strike ‘are not favored and will not be granted unless it is clear that the allegations in question can have no possible bearing on the subject matter of the litigation.’” *Crespo v. N.Y.C. Transit Auth.*, 2002 WL 398805, at *11 (E.D.N.Y. Jan. 7, 2002) (quoting *Lennon v. Seaman*, 63 F. Supp. 2d 428, 446 (S.D.N.Y. 1999)); *see also OTG Brands, LLC v. Walgreen Co.*, 2015 WL 1499559, at *5 (S.D.N.Y. Mar. 31, 2015) (a party seeking to strike allegations must show [1] that evidence in support of the allegation would be inadmissible, [2] the allegations have no bearing on relevant issues, and [3] permitting the allegations to stand would result in prejudice to the movant). As the Second Circuit has noted, “courts should not tamper with the pleadings unless there is a strong reason for so doing.” *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976).

Torres v. New York Methodist Hosp., 2016 WL 3561705, at *14 (E.D.N.Y. Jan. 7, 2016).

Francoeur has not met his burden of showing all three of these requirements for the entire SAC or portions of it. He just makes conclusory assertions. (Def. Strike Mem. at 11-13).

Additionally, allegations in a complaint that supply background or historical material and are of an evidentiary quality will not be stricken unless unduly prejudicial to the defendant.

Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 402 F.Supp. 636, 637-638 (S.D.N.Y. 1975). The genesis of the claims for relief in this action is the Murdoch Case. According to Francoeur,

A court may take “judicial notice of these state court filings.” *Taveras v. Morales*, 22 F. Supp. 3d 219, 228 (S.D.N.Y. 2014); *see also Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir.1991) (courts may “take judicial notice of documents filed in other courts . . . to establish the fact of such litigation and related filings”).

(Def. Strike Mem. at 3 n.1). Throughout these proceedings, attorney Francoeur has repeatedly referred to the Murdoch Case in the state court and provided his own interpretations of the facts therein and their legal consequences. (Dkt. 14 at 1, 2; Dkt. 20 at 2; Dkt. 34 numerous exhibits from the Murdoch case; Dkt. 35 at 5, 7-11, 13, 16, 18, 22-23; Dkt. 38 at 1-3; Dkt. 47 at 2). More

recently, his “collateral estoppel” argument relies on the events in the Murdoch Case. (Def. Strike Mem. at 19-21, Dkt. 67). After repeatedly using the background and history of the Murdoch Case for his arguments, Francoeur now hypocritically censures Plaintiff for doing the same.

The SAC ¶¶ 43, 120-123 references the penal codes and the criminal complaints Plaintiff filed against Defendants—not “attempts” to file, nor “unsuccessfully”, nor “surreptitiously” as Francoeur misrepresents (Def. Strike Mem. at 7, 12). Plaintiff is unaware of any law requiring the victim of a crime to notify the criminals of his communications with law enforcement. Out of courtesy, however, Plaintiff did just that concerning his initial communications. (SAC ¶¶ 122-123). Plaintiff is not asking this Court to incarcerate the Defendants—that is not its role. But since attorney Francoeur has chosen to criticize Plaintiff for exercising his right to complain about criminal conduct to the proper authorities, Plaintiff would be amiss in not providing the reasons. The premier treatise on Internet law recommends that when computer information is duplicated without authorization, law enforcement should be involved. Ian C. Ballon, *E-Commerce and Internet Law* at § 44.11 (2d ed. 2016). Which is what Plaintiff did and will continue to do. The District Attorney’s Office is presently waiting for a decision in this Court.

The references to the criminal complaints and penal codes (SAC ¶¶ 43, 120-123) provide this Court with a full factual background of this case up to the time of the SAC filing—which is what an amended complaint is supposed to do. The same is true for Defendants underhanded tactics in litigating the Murdoch Case that included forging a key article that was in dispute, playing the “feminist card” against Plaintiff, stacking the lower court record with irrelevant documents to increase the cost of appellate printing, and prevaricating about the Murdoch newspaper’s connections with New York. (SAC ¶¶ 32-40, 44, 48-49, 53-54).

When the party seeking the elimination of alleged scandalous matter was the “first to hurl epithets,” a court will deny the motion to strike. *See Lewis v. Shaffer Stores Co.*, 218 F.Supp. 238, 240 (S.D.N.Y. 1963); *von Bulow by Auersperg v. von Bulow*, 657 F. Supp. 1134, 1146 (S.D.N.Y. 1987) (quoting *Lewis*, defendant is “hardly in a position to complain when plaintiff responds in kind”). Francoeur and his clients started slinging mud at the very beginning of this case by denigrating Plaintiff over a prior case that had nothing to do with this action or the Murdoch Case and tarring him as a “serial litigant,” “vexatious” and one who resorts to “harassing litigation” of an “abusive nature.” (Letter at 3, January 31, 2017, Dkt. 14; Letter at 2, April 5, 2017, Dkt. 20). They continued using irrelevancies from Plaintiff’s prior cases that had nothing to do with this action to further their disparagement of him. Francoeur’s first memorandum to dismiss cited to six of Plaintiff’s past cases—12 times, and Francoeur’s reply falsely stated that Plaintiff “attacks . . . courts” and filed an “invective filled” memorandum. (Def. Dismissal Mem. at iii-iv, Dkt. 35; Reply at 1, Dkt. 38). Francoeur’s calumny continued with his memorandum to strike by repeatedly accusing Plaintiff of harassing Defendants. (Def. Strike Mem. at 8, 11, 12, 21, Dkt. 67).

As for redundancy, at the oral hearing, Your Honor and Plaintiff had a discussion over the meaning of attorney work, which is why Plaintiff’s position was included in the SAC ¶¶ 3, 93, 103-111. If Your Honor wants to delete it as redundant, then that is fine with Plaintiff.

III. The plausibility standard for a Fed. R. Civ. P. 12(b)(6) motion to dismiss

The U.S. Supreme Court states that the analysis begins with “taking note of the elements a plaintiff must plead to state a claim . . . ,” *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009), then proceeds in two steps: First, identify the specific allegations in a complaint that “are not entitled to the assumption of truth.” *Ashcroft* at 679; *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir.

2010). Those are statements that cut and copy the elements of a cause of action; that is, they are conclusory. *Ashcroft* at 678 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

The allegations should be more than an “unadorned: the-defendant-unlawfully-harmed-me accusations.” *Id.* Some legal conclusions, however, are permissible when the defendants are given notice of the date, time and place of the alleged illegal conduct. *Iqbal v. Hasty*, 490 F.3d 143, 156 (2d Cir. 2007), *rev’d sub nom. on other grounds, Ashcroft v. Iqbal*, 556 U.S. 662.

Second, the analysis considers the remaining factual allegations in the complaint as true and determines if they plausibly—not probably but more than possibly—infer that the defendant is liable for the misconduct alleged. *Ashcroft* at 678; *Hayden* at 161. In doing so, the courts “draw[] all inferences in favor of the plaintiff,” *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 692 (2d Cir. 2009) (citation omitted), and a complaint should not be dismissed based on a judge’s disbelief of the factual allegations even if it strikes a “judge that actual proof of those facts is improbable.” *Twombly* at 556. Francoeur failed to use this analysis.

A. The SAC adequately alleges that Defendants violated CFAA 18 U.S.C. § 1030(a)(2)(C) causing loss under § 1030(e)(11).

The elements for this civil action under the CFAA, 18 U.S.C. § 1030(a)(2)(C), are (1) intentionally accessing without authorization a computer used in interstate or foreign commerce (also referred to as a “protected computer”) (2) obtaining information there from, and (3) causing loss under § 1030(e)(11).⁷

⁷ Francoeur mistakenly tries to invent new elements for a CFAA violation by asserting that complaints are prohibited from alleging basic facts that logically infer ultimate facts, time frames denoted by “on or about,” and using the term “on information and belief.” (Def. Strike Mem. at 14-15). He even falsely attributes to CFAA this Court’s comment concerning copyright: “Information and belief does not mean you can guess,” (2/16 Tr. 32:14-15). The plausibility standard “does not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant . . . or where the belief is based on factual information that makes the inference of culpability plausible.” *Arista Records LLC v. Doe*, 604 F.3d 110, 120 (2d Cir. 2010) (citations omitted). Additionally, Plaintiff must not be put to the test to prove his allegations at the pleading stage. *NOW, Inc v. Scheidler*, 510 U.S. 249, 256 (1994); *Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947).

(1) The protected computer in this case is the website MRL.net located on a computer in Scottsdale, Arizona, which Plaintiff used as an iCloud for storing personal, legal and business files. (SAC ¶¶ 2, 3). The SAC and the hearing before Your Honor referred to the MRL.net site as the “iCloud.” MRL.net was protected by access codes until on or about December 30, 2014, *see above* at § I, when Defendants gained access without Plaintiff’s authorization (SAC ¶ 20).

(2) As Defendants admit in their affidavits (Def. Strike Mem. Exs. G, H, Dkts. 66-7, 66-8) they obtained information from MRL.net: the “Responses to Media” and the Schafer screenshot. (SAC ¶ 19). Francoeur argues that because the SAC refers to Defendants’ affidavits, those affidavits must be considered true and contradictory allegations in the SAC false. (Def. Strike Mem. at 13-14). Such a rule would result in the dismissal of all complaints for fraud, wire fraud, defamation and other causes of action that require a complaint to include defendants’ false statements because those statements will have to be considered true and any contradiction with a complaint’s allegations will mean the plausibility standard is not met.

(3) Under 18 U.S.C. § 1030(e)(11), “the term ‘loss’ means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense” Loss includes time and expenses in analyzing, investigating, assessing security of a computer, modifying computers to prevent further unauthorized access, and otherwise responding to the intrusion. *E.g., Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1066 (9th Cir. 2016) (hours spent analyzing, investigating, and responding to defendant’s actions); *A.V. v. iParadigms, LLC*, 562 F.3d 630, 646 (4th Cir. 2009) (costs of investigation undertaken to determine how party gained access to its site); *Univ. Sports Pub. Co. v. Playmakers Media Co.*, 725 F. Supp. 2d 378, 388 (S.D.N.Y. 2010) (investigating defendants’ alleged crimes sought to

identify evidence of the breach, assess any damage it may have caused, and determine whether any remedial measures were needed). “The statute allows the costs of time spent assessing computer systems to be counted towards the loss requirement.” *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 647 (E.D. Pa. 2007) (company president valued his time at \$60-\$100 per hour).

“While costs incurred by a Plaintiff in response to a violation of the CFAA must be reasonable in order to constitute losses under § 1030(e)(11) . . . whether Plaintiff’s costs in this case [are] reasonable is a question of fact not to be resolved at the Motion to Dismiss stage.” *Ipreo Holdings LLC v. Thomson Reuters Corp.*, 2011 WL 855872, at *7 (S.D.N.Y. Mar. 8, 2011). Francoeur, however, asserts in the Rule 12(b)(6) section of his memorandum (pp. 16-17, Dkt. 67) that Plaintiff’s costs for investigating Defendant’s actions were not reasonable. The case relied on by Francoeur held that the costs of flying company executives from Europe to meetings in the U.S. were not related to responding to the alleged CFAA offenses because as the court explained, “nothing” in the meetings related to investigating the CFAA violation. *Nexans Wires S.A. v. Sark- USA, Inc.*, 319 F. Supp. 2d 468, 476 (S.D.N.Y. 2004). Plaintiff does not allege travel costs in this action.

The SAC adequately alleges losses of over \$5,000. (SAC ¶¶ 95-102, 137-139, Dkt. 68).

B. The Schafer screenshot and Google-cache and the Bolger cache contained copyrighted material that Defendants reproduced, distributed and displayed without Plaintiff’s authorization; thereby, infringing Plaintiff’s copyrights.

1. The Schafer screenshot and Google-cache and the Bolger cache contained registered-copyrighted material.

The SAC alleges that registered-copyrighted material from a prior work, “royden hollander.com,” had been incorporated into the homepage of MRL.net. In order to prove such required Plaintiff to obtain a date from the Copyright Office to view its files of the deposited

copies for “roydenhollander.com.” (SAC ¶ 116, Dkt. 48). At the time of filing the SAC, the Copyright Office had not yet scheduled a date. Since then, a date was set and Plaintiff’s paralegal viewed the Copyright Office’s files. The paralegal’s affidavit specifically sets out the registered-copyrighted material included in the Schafer screenshot and the Google-cache. (Ex. J).

As for the cache that Bolger copied and included in her affirmation in the Murdoch Case (Ex. A), and, on information and belief, also sent to her clients; it was a direct copy of part of the registered-copyrighted work “roydenhollander.com.” (Ex. J-3).

2. Defendants infringed by reproducing, distributing and displaying the Schafer screenshot, Google-cache and Bolger cache without Plaintiff’s authorization.

The Copyright Act of 1976, 17 U.S.C. § 106(1), (3), (5), gives copyright owners protection from unauthorized reproduction, distribution or display of their works. The Schafer screenshot, Google-cache and Bolger cache contained registered-copyrighted material that Defendants knowingly reproduced, distributed and displayed to the public by placing them on the N.Y. Supreme Court website and separately sending them to their clients.

The publication status of a work affects whether others may make fair use of it. One of the four factors analyzed in fair use analysis is “the nature of the copyrighted work.” 17 U.S.C. § 107(2). The unpublished nature of a work can have a dispositive impact on the fair use analysis. In *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985), the Supreme Court held that “[t]he fact that a work is unpublished is a critical element of its ‘nature,’” under the second of the four fair use factors. *Id.* “[T]he scope of fair use is narrower with respect to unpublished works.” *Id.* “[T]he author’s right to control the first public appearance [publication] of his undissemated expression will outweigh a claim of fair use.” *Id.* at 555. In *Harper & Row*, the unpublished nature of President Ford’s manuscript was the critical piece of evidence that defeated the fair use defense. *Id.* at 569.

The Copyright Act of 1976 defines “[p]ublication’ [a]s the distribution of copies . . . of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. . . . A public performance or display of a work does not of itself constitute publication.” 17 U.S.C. § 101. Even had Defendants made reproductions from a publicly viewable site [and no, Francoeur, Plaintiff is not admitting the MRL.net was publicly viewable as Defendants allege] that does not mean the registered-copyrighted material had been published. The copyrighted materials in the Schafer screenshot, Google-cache and Bolger cache were not published because any alleged display to the public was not (1) a distribution and not (2) a transfer of ownership.

The legislative history is clear that any form of distribution in which the material object in which the work is fixed does not change hands is not a publication no matter how many people view the work. Copyright Act, House Report No. 94-1476, p. 138, Sept. 3, 1976; 94th Cong., 2nd Sess. 1976, 1976 U.S.C.C.A.N. 5659, 5754. “[A] *sine qua non* of publication should be the acquisition by members of the public of a possessory interest in tangible copies of the work in question.” *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 37 (1st Cir. 2003) (quoting *Nimmer on Copyright* § 4.07 (2001)). In *Danielson*, the plaintiff had displayed drawings that were disseminated by cable television to the general public. “At most, Danielson . . . showed the [drawings] to others; that did not constitute publication under the explicit terms of the statute.” *Danielson* at 37. “[W]hen a work is disseminated electronically, [i]t is clear . . . that under the statutory language now in effect there has been no ‘distribution of copies . . . to the public’ and hence no publication.” Prof. Schechter & Prof. Thomas, *Intellectual Property: The Law of Copyrights, Patents and Trademarks*, § 5.1, p. 81 (2003). The definition of publication “eliminates any ambiguity over display of works where there are no restrictions on copying, as it makes it quite plain that such display does not constitute a

publication in any event.” *Id.*; *see e.g., Agee v. Paramount Communs.*, 59 F.3d 317, 325 (2d Cir. 1995) (“distribution is generally thought to require transmission of a ‘material object’”); *Arista Records, Inc. v. Mp3Board, Inc.*, 2002 WL 1997918 at *4 (S.D.N.Y. 2002) (citing *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (distribution requires dissemination of copies to the public)). Without the transfer of an existing material object or of an ownership or possessory interest in such an object, no distribution occurs, William F. Patry, *Patry on Copyright*, § 13:11, 13-24, 25 (2015 ed.); therefore, no publication.

No material object of the registered-copyrighted expressions on the MRL.net homepage were distributed and none of those expressions were sold, rented, leased or loaned. In *Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189, 197 (S.D.N.Y. 2006), the Court held that posting images of a play on the Internet “even assuming it constituted ‘distribution,’ did not involve ‘sale or other transfer of ownership, or by rental, lease or lending.’” Indeed, this result follows directly from the principle that “the projection or exhibition of a motion picture in theaters or elsewhere does not in itself constitute a publication.” *Id.* (internal quote *Nimmer* at § 4.11[A]); *see also McLaren v. Chico’s FAS, Inc.*, 2010 WL 4615772, at *4 (S.D.N.Y. Nov. 9, 2010) (“this claim that images composing the [work] were posted on her website would not in any event suffice to plead ‘publication.’”) (citation omitted).⁸

IV. Collateral estoppel does not apply.

Every CFAA and Copyright issue involved in this case—whether fact or legal—must have been litigated and disposed of by Justice Schecter’s decision on Plaintiff’s motion to withdraw the “Responses to Media” document. *See Zabriskie v. Zoloto*, 22 A.D.2d 620, 623 (1st

⁸ Francoeur’s fair-use objection falsely claims that a “Summary Order” from the Second Circuit “established [the] rule in this circuit.” (Def. Strike Mem. at 19, Dkt. 67). Francoeur, however, fails to note that Summary Orders have no precedential value. *Second Circuit Local Rule* 32.1.1.

Dep't 1965). Estoppel does not apply when the first decision is a general verdict because such does not clarify precisely what the court found on an issue that was actually raised, assuming it was. *See Manard v. Hardware Mutual Casualty Co.*, 12 A.D.2d 29, 30 (4th Dept. 1960). Justice Schechter issued a bare general verdict on the motion to withdraw: "Denied. There is no basis for granting the relief sought." (Def. Strike Mem. Ex. I, Dkt. 66-9). It is, therefore, impossible to say what issues were determined. Further, the CFAA was mentioned once in the papers but never argued during the short back and forth in front of Justice Schechter who never even mentioned the CFAA in her decision.

As for copyright, state courts do not have subject matter jurisdiction over a copyright action, 28 U.S.C. § 1338(a), so it could not have been litigated or determined.

V. Sanctions

Over two different cases in two different courts, Defendant Bolger and now her attorney Francoeur have demonstrated a pattern of attacking Plaintiff's character and credibility with past irrelevancies, misrepresentations, prevarications and overstatements in order to injure Plaintiff's reputation, harass him during a court action, and further their litigation by personal destruction. Their citations to Plaintiff's past cases that have nothing to do with this case or the Murdoch case were clearly for the improper purpose of trying to bias this Court and intimidate Plaintiff into giving up. (*See above* at p. 17).

Francoeur and Defendants keep self-righteously calling for "sanctions, sanctions!" against Plaintiff, but what about sanctions against them. For instance, their intentional effort to intimidate Plaintiff into withdrawing a request for early discovery. (Francoeur letter of May 9, 2017, addressed to Plaintiff, but not copied by him to the Court, Ex. K). In it, Francoeur threatened:

We are writing to demand that you immediately withdraw your Letter Motion to the Court dated May 8, 2017 (Dkt. 27) We therefore demand that you immediately withdraw your Letter Motion. If you fail to do so, we reserve the right to seek all appropriate relief from the Court.

Why such nastiness—any party has the right to ask for early discovery.

Francoeur’s repeated accusation that Plaintiff is harassing his clients rather than doing what he’s supposed to do—use the judicial system to defend his rights—makes no sense. How could Plaintiff possibly harass the successful, well-off Generation X Defendants? As Francoeur wrote:

Ms. Bolger is an accomplished litigator and a partner [now at Davis Wright Tremaine LLP], in addition to an adjunct faculty member at Fordham Law. She has been recognized by Chambers & Partners as a leading media lawyer nationwide and by Best Lawyers as one of the preeminent media lawyers in New York.”

(Def. Dismissal Mem. at 4, Dkt. 35). Plaintiff, however, is living off of social security and document review work, a septuagenarian and faced with all the usual problems of old age—not exactly a threat, especially as compared to Francoeur who clearly enjoys beating up on seniors. However, if Francoeur wants to file a motion for sanctions, Plaintiff has no objection—providing Plaintiff is also permitted to file a motion for sanctions against Francoeur and Defendants.

CONCLUSION

For the above reasons, Plaintiff respectfully requests this Court deny Defendants’ motions and grant such other relief as this Court deems appropriate.

Dated: September 7, 2018
New York, N.Y.

Respectfully submitted,
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