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FRANK A. DELLE DONNE, ESQ.
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APL-2017-00028

State of New York
Court of Appeals



LINDSAY LOHAN,

Plaintiff-Appellant,

-against-

TAKE-TWO INTERACTIVE SOFTWARE, INC., ROCKSTAR GAMES,
ROCKSTAR GAMES, INC. and ROCKSTAR NORTH,
Defendants-Respondents.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

MONACO & MONACO, LLP
Of Counsel to:
The Pritchard Law Firm
7610 13th Avenue, 2nd Floor
Brooklyn, New York 11228
(718) 872-0533
law@attorneysmonaco.com

ROBERT O. PRITCHARD, ESQ.
THE PRITCHARD LAW FIRM
Attorneys for Plaintiff-Appellant
30 Wall Street, 8th Floor
New York, New York 10007
(212) 859-5027
rop@pritchardlawfirm-nyc.com

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N.Y. CONST.17

This Reply is submitted in further support of Ms. Lohan's Appeal. GTAV does not address the issues raised in Ms. Lohan's opening Brief. The issue is whether GTAV's "purposes" in developing Ms. Lohan's "portrait" in the "Beach Weather" and "Stop and Frisk" digital portraits and the invented fictional biography of the avatar which includes the "voice" was for "advertising or trade purposes" as opposed to expression. Section 51 specifically uses the word "purposes" because it is the creator's intent that is the most substantial factor. Accordingly, in Kennedy Onassis and Woody Allen the creator's intent or purpose was advertisement as opposed to expression which was readily apparent from the circumstances, but it cannot be credibly said that the required makeup, outfits, photography, production, film developing and writing for those advertisements is not artistic. Film developing in a darkroom alone is an art. The artist painting the "portrait" is still making art, but it depends whether it is made and used for "advertisement or trade purposes" or whether it is made for an expressive purpose which depends substantially on the creator's and user's intent or purpose.

Each point GTAV made in its opposition Brief will be cut down in turn. The Amended Complaint alleges that GTAV deliberately drafted digital sketches of Ms. Lohan and deliberately used these "portraits" on the game discs, game packaging and on billboard advertisements for improper "advertising or trade purposes". GTAV without foundation argues that Ms. Lohan acknowledges that

the images and voice are not actually hers which is simply not true as the Amended Complaint states in paragraph 1 (R 18) that “The Defendants have used the Plaintiff’s images, portraits and voice in large advertising and marketing campaigns, as well as, in the merchandising of GTA V”, and at R 24 it uses the phrase “displaying her portraits, voice”. This plain language alleges that the digital “portraits” and digital “voice” productions GTAV uses are Ms. Lohan’s. In other words, just as a sketcher draws a sketch from a subject or a picture, the allegations are that GTAV deliberately sketched Ms. Lohan digitally- portrait and voice- and produced digital reproductions of her “portrait” and “voice” to use them for “advertising and trade purposes”. Mr. Rosa’s unsubstantiated conclusory denial (R 66) merely creates a question of fact as the issue is whether the GTAV digital portrait and voice maker deliberately made the portraits and voice to be Ms. Lohan for “advertising or trade purposes”.

It is inappropriate for GTAV to repeatedly argue that Ms. Lohan “acknowledges that the images and voice are not of her” (GTAV Br. at 21-22). Because Ms. Lohan properly alleges (R 21-32) that her digital portrait that GTAV uses for its internet and billboard “advertising” and on the product itself for “trade” (GTAV Br. at 11-12) is her “portrait” and because the avatar (R 48 dvd clip, R 122) including the voice are her digital “voice”, Ms. Lohan alleges a sustainable cause of action under the statute no matter how much computer talent and artistic

skill is required to produce them. No matter the rest of the work is fiction/satire, it violates the statute to hypothetically use Madonna's portrait on the cover of the Notre Dame book, it violates the statute to use a Bill Gates' portrait on a novel titled "White Collar Theft Online", and it violates the statute to use Ms. Lohan's portrait and voice in the two still images and in the avatar, respectively¹.

I. THE FIRST DEPARTMENT ERRED IN HOLDING THAT GTAV'S USE DID NOT VIOLATE SECTION 51 BECAUSE GTAV'S PURPOSE IN MAKING AND USING THE PORTRAIT AND VOICE IS CLEARLY ADVERTISING AND TRADE AND GTAV CANNOT DEMONSTRATE THAT AN EXCEPTION APPLIES

Firstly, "Beach Weather" and "Stop and Frisk are simply an "advertisement in disguise having no "real relationship to the content" of playing the game as explained in Messenger, 94 N.Y.2d at 446, 706 N.Y.S.2d at 58 citing Arrington, 55 N.Y.2d at 440, 449 N.Y.S.2d at 944 as these still portraits appear only on transition screens and have really nothing to do with playing the video game (R 65, 73, 99) despite GTAV's strained position that one irrelevant game instruction appears juxtaposed next to each image for a brief moment (GTAV Br. at 11-12). Secondly,

¹ Creating a video game and creating a "portrait" painting both require artistic skills. Obviously, that alone does not entitle them to Free Speech protection if the "portrait" is created wholly and used wholly for "advertising or trade purposes". (R. 39, 57, 34-37, GTAV Br. at 9-11). "To give absolute protection to expressive works would be to eliminate the statutory right of privacy. Accordingly, under New York law, the newsworthy or public concern exception does not apply where the newsworthy or public interest aspect of the images at issue is merely incidental to its commercial purpose." Foster, 128 A.D.3d at 159, 7 N.Y.S.3d at 102-103.

the digital avatar “Lacey Jonas”, voice reproduction (R 48 dvd clip) and story is an “invented fictional biography that is nothing more than an attempt to trade on Ms. Lohan’s persona” (R 28) specifically proscribed by the statute as explained in Messenger, 94 N.Y.2d at 446, 706 N.Y.S.2d at 58, *i.e.* “portrait” here and “name” in Spahn.

The New York Free Speech exceptions do not shield GTAV’s prohibited use of the celebrity portraits in this circumstance as the still portraits are not protected speech regarding matters of news, public interest, transformative art or parody/satire/fiction, but rather are knowingly designed specifically for advertising or trade purposes in violation of section 51.

Portrait, Picture or Voice

GTAV argues on page 21 of their opposition Brief that “Ms. Lohan concedes that these three distinct characters are not literal depictions of her” (GTAV Br. at 21) which is simply not true as the Amended Complaint specifically alleges that the digital portrait and digital voice productions are of her *supra*. At no point did Ms. Lohan “concede” that the uses were not “literal depictions” of her. The opening Brief at page 14 used “exact duplication” and at page 24 used “exact depiction”. No portrait is an exact duplication or an exact depiction of the photograph or the model. All of the case law supports the only rational conclusion

that Ms. Lohan alleges a sustainable cause of action on the “portrait, picture or voice” prong of the statute with GTAV’s unauthorized use of these digital portraits, digital avatar and digital voice productions because the Amended Complaint reasonably alleges that GTAV deliberately made them to be Ms. Lohan as many other reputable unrelated third parties believe too. (R 44-46).²

GTAV’s opposition Brief on pages 22-23 uses the phrase “evocation or suggestion is not enough”, “sounds like” and “dress like” which these arguments ignore the allegations of the Amended Complaint *supra*. All of the case law supports Ms. Lohan’s position that deliberate representations are sustainable under the statute regarding the “portrait, picture or voice” prong and GTAV does not point to one case that holds otherwise.

GTAV’s reliance on Wojtowicz, 58 A.D.2d at 46-47 only illustrates GTAV’s meritless position. Though the actor may or may not have looked like plaintiff, the statutory requirement was not satisfied because defendant changed her “name” and plaintiff did not argue that the actor looked like her sufficient to be “recognizable” as plaintiff to satisfy the statutory requirement of “picture or portrait” as the actors or models in Binns, 210 N.Y. 51, Allen, 610 F. Supp. at 622-623 and Kennedy Onassis, 472 N.Y.S.2d at 262.

² Though not applicable to the case at bar, apparently GTAV does not understand that an artist can intend to make a portrait of someone and have it turn out not to look like that person which is where the “reasonably recognizable” language in the case law is derived from. GTAV struggles with that concept frequently in their opposition Brief.

GTAV's opposition brief on pages 23-24 further argues that Allen and Kennedy Onassis were "advertisements unrelated to an expressive work." GTAV jumps ahead with that statement because we are still talking about *portrait, picture* and *voice* further illustrating GTAV's unsupported analysis. On page 24 GTAV again misses the mark stating that "evocation" is not enough. As demonstrated *supra* there are allegations that GTAV deliberately made these visual and audio productions to be Ms. Lohan which GTAV again simply ignores.³ Similarly on page 24 GTAV misapplies Ali v. Playgirl, 447 F. Supp. at 726-727 which simply holds that a cartoon sketch is sustainable as a "portrait or picture" under the statute- not whether that obvious parody or satire cartoon comment is an improper "advertising or trade purpose". Again GTAV is on the wrong prong of the statute.

Advertising or Trade Purposes

After mis-analyzing all of the case law on "portrait, picture and voice" *supra*, GTAV's opposition Brief on page 25 then points to the "advertising or trade" prong of the statute. GTAV is wrong in stating "Works such as GTAV simply are not covered by the statute as a matter of law" (GTAV Br at 25). No matter how much artistic skill the producer of the portrait has in producing the

³ In short, the whole analysis comes down to defendant's deliberate intent on both prongs of the statute- "portrait, picture or voice" and "advertising or trade". If the allegations of the complaint allege that defendant deliberately created the "portrait or voice" for an improper "advertising or trade purpose", the action is sustainable as long as the allegation is reasonable based on the surrounding circumstances.

portrait, if the purpose is to make the portrait solely for “advertising or trade purposes”, the statute is violated no matter how much defendant labels it artwork. Schoeman v. Agon Sports, 816 N.Y.S.2d 701 (Sup. Nassau 2006). There is no doubt that the photographer in Foster, 128 A.D.3d at 153-154, 7 N.Y.S.3d at 98-99, did not take that picture for “advertising or trade purposes” because there is no marketing value in using an ordinary person’s picture to advertise a product. The Foster type “art gallery” cases are drastically different than the case at bar *i.e.* deliberately created these portraits and voice productions to actually be Ms. Lohan for “advertising or trade purposes”. GTAV’s statement on page 26 of their opposition Brief that, “The highly creative character of GTAV’s world of satire, parody, action and adventure is beyond question”, is simply irrelevant for the same reasons. Because the allegations are that the misused items are Ms. Lohan, whether the remainder of the GTAV world is fiction, satire or parody is irrelevant because GTAV does not admit that they are making satire or parody about Ms. Lohan. The unsubstantiated and conclusory pre-Answer denial (R 66) simply creates a question of fact under these obvious circumstances.



(R 39)



(R 54)



(R 38)



(R 35)

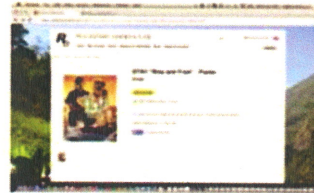


(R 36)

Lindsay Lohan for JAG jeans



(R 37)



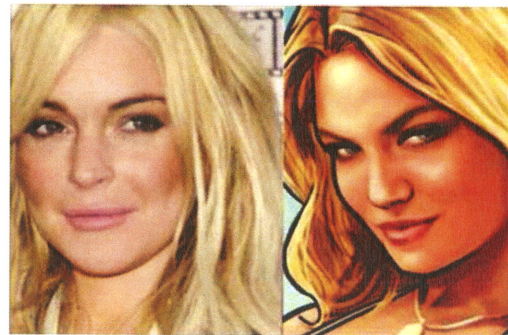
(R 248)



(R 34)



(R 44)



(R 59)

The level of the “game’s creative character” (GTAV Br. at 26) is simply irrelevant in determining whether GTAV deliberately and purposefully produced the portraits and voice to be Ms. Lohan for improper “advertising or trade purposes”. GTAV’s reliance on Lohan v. Perez, 924 F. Supp. 2d 447, 454-455 (EDNY 2013) is misplaced because there Pitbull’s song only mentioned the

“name” one time in a remote part of the song making it incidental use because no reasonable conclusion could ever be drawn that there was an “advertising or trade purpose” behind the use. Indeed, the court held and quoted as follows.

Whether a use falls within [the incidental use] exception to liability is determined by the role that the use of the plaintiff’s name or likeness plays in the main purpose and subject of the work at issue. Lohan v. Perez, 924 F. Supp. 2d at 455.

The second prong of the statute uses the word “purposes” simply meaning that the most substantive factor of determining improper “advertising or trade purposes” is the intent or purpose of the person who produces and uses the “portrait, picture or voice.” Just as in Foster, no rational conclusion could ever be drawn that Pitbull would think to advertise his song by using that “name” once in a remote corner of a song so it is exponentially easier to find an expressive purpose when there can be no reasonable identifiable “advertising or trade purpose”.

Moving to the bottom of page 27, GTAV again fails to address that the allegations plainly stating that the “portraits” and “voice” are actually and intentionally of Ms. Lohan *supra*. Rather, GTAV again uses the term “evoke her” which is not the claim Ms. Lohan is making here though it may be the claim in Gravano which GTAV force-fits that case onto Ms. Lohan’s case which the facts are drastically different as the proscribed “advertising or trade purpose” is obvious when viewing the digital portraits and usages of Ms. Lohan *supra* and is not obvious in Gravano which Gravano lacks the “portrait” (GTAV Br. at 11-12, 13-

14), the “advertising” (R 54-58, 248) and the “trade” (R 34, 38) components needed to demonstrate the proscribed intent or purpose. (R 54-58, 248).

Moving to page 28 of GTAV’s opposition Brief, the transition screens not being “subject to player manipulation” is just another fact demonstrating improper “advertising or trade purposes”. “Escape Paparazzi” contains the Lindsay Lohan avatar named “Lacey Jonas” which contains the digital reproduction of Ms. Lohan’s “voice”. GTAV does not address the voice claim other than stating the avatar is absolutely protected. Also, the “voice” claim and the other intentional and non-coincidental identical similarities in story to Ms. Lohan’s life (R 28) are obviously probative on the intent required for “advertising or trade purpose” for the other two still portraits and the avatar claims. Tin Pan Apple v. Miller Brewing Co., 737 F. Supp. 826, 838 (SDNY 1990).

Ms. Lohan’s claim is that GTAV cannot use her digital “portrait” juxtaposed next to these “game-play instructions” and that GTAV intentionally did so solely for “advertising or trade purposes” with the two still portraits. The fact that the two transition screens do not move and cannot be manipulated by the player is just another fact relevant to GTAV’s real intent in using them because there is “no real relationship” for the portraits in playing the game and they are merely “advertisements in disguise” under Arrington (55 N.Y.2d at 440, 449 N.Y.S. at

944) and its progeny *i.e.* juxtaposed portrait next to the game instructions. (GTAV Br. at 11-12).

On the bottom of page 28 GTAV misapplies the holdings in Foster, Altbach and Hoepker because in those three cases plaintiffs could not demonstrate that the portrait or picture was something the photographer or artist would ever reasonably think to use for advertising while the work was being made so the answer is obvious. Again, it is the producer's "purpose" while creating the portrait or voice reproduction that counts together with the "purpose" in which it is later used. At the top of page 29, GTAV makes another error in arguing that the two digital portraits of Ms. Lohan "Beach Weather" and "Stop and Frisk" are exempt as art whether they are in the game or had no connection to it. That is simply a flagrant misstatement of the law because every "portrait" is art in that it is art to paint, draw or produce a "portrait" of a person from a photograph or model. The real question as the New York courts have properly held for over a century is whether or not the "portrait or "picture" was intentionally made and intentionally used for "advertising or trade purposes". An allegation by a celebrity of portrait on a product is very relevant in determining the artist's intent in creation and use. If the artist's intent is "advertising or trade purpose" in both creation and use, the work does not fall into one of the statute's Free Speech exceptions. In the case at bar, it is reasonably alleged that GTAV had deliberate improper intent at the

development, advertising and packaging stages. With this record, GTAV simply cannot demonstrate as a matter of law that their production and use of Ms. Lohan's portrait and voice fits into one of the New York Free Speech exceptions to the "advertising or trade" prong of statute.⁴

Moving onto page 29 in another attempt to side-step the real issue, GTAV states that "Ms. Lohan cannot credibly deny that the content about which she complains is creative and is part of an expressive work". (GTAV Br. at 29). Every "portrait" can be said to be a creation by an artist who paints or digitally draws it, but that does not mean the "portrait" can be made and used for an "advertising or trade purpose". Whether the remainder of the work falls into a Free Speech exception is irrelevant to the portrait alleged to violate the statute. If the creation and use is for an "advertising or trade purpose" then the use does not fall into an "expressive" statutory New York Free Speech exception. All the art gallery promotion cases like Foster are not applicable here because in Foster the intent to use the work for promotion is formed after the creation, whereas here the purpose of creating the digital portraits is reasonably alleged to be for "advertising or trade purposes" which is obviously lacking in Foster and its progeny. GTAV has simply

⁴ There is no separate Free Speech analysis that is often argued as GTAV does here simply because the New York statute was drafted with the First Amendment in mind which the newsworthy, public interest, transformative art and parody/satire/fiction exceptions keep the statute consistent with the First Amendment. Foster, 128 A.D.3d at 155-157, 7 N.Y.S.3d at 100-101. In other words, if the creation and use fits into one of the four Free Speech exceptions, there is no "advertising or trade purpose" under the second prong of the statute.

not demonstrated that the “portraits” and “voice” were not intentionally made to be Ms. Lohan other than with a conclusory and unsubstantiated pre-Answer denial (R 66) which simply creates a question of fact at best for GTAV.

On page 30 GTAV is wrong again because under the statute and the case law properly interpreting it for the last century, when there is no “advertising or trade purpose” during its creation, the work then fits into one of the New York Free Speech “expression” exceptions. If the intent to use the work in promotion is formed after the work is created, there is no “advertising or trade purpose” because there was an “expressive” purpose in creating the work. Indeed, “To give absolute protection to all expressive works would be to eliminate the statutory right of privacy.” Foster, 128 A.D.3d at 159, 7 N.Y.S.3d at 102-103. The answers to these questions are most of the time obvious to the New York courts considering them for obvious reasons as an “advertising or trade purpose” generally requires strategy during creation and use which in a case like Foster or Hoepker there obviously is none. GTAV cannot credibly argue otherwise.

On pages 31-32 GTAV is again wrong because the two Ms. Lohan “portraits”, and the “Escape Paparazzi/Lacey Jonas” (R 48 dvd clip) avatar using Ms. Lohan’s digital “voice” production and life story elements (R 28) as further evidence of “advertising or trade purpose” during creation, are reasonably alleged to be made and used for nothing other than “advertising or trade purposes”

regardless of whatever expressive satirical comment GTAV may or may not be making about contemporary Hollywood life. In other words, GTAV does not need Ms. Lohan's "portraits" and "voice" to make whatever expressive comment their attorneys claim they are making, and the use of them is just an "advertisement in disguise" as there is no need for them to make their satire about Hollywood. If Ms. Lohan's "portraits" and "voice" were parodied with exaggeration, then GTAV's argument of "expression" might be less nebulous, but that is not the circumstance here as the "portraits" and "voice" are virtually identical in that they are as close as a digital drawing or audio production can get to a photograph or analog audio recording.

On page 32 GTAV is again wrong. Though fiction and satire are ordinarily not improper "advertising" or "trade" under the statute, it is well settled that when "the substantially fictional works at issue are nothing more than attempts to trade on the persona" of plaintiff, such "invented biographies" do not fulfill the purposes of the newsworthy exception. Messenger, 94 N.Y.2d at 446, 706 N.Y.S.2d at 58 citing Binns and Spahn. In Spahn, the defendant's publication used a famous baseball player's "persona" with dramatization, imagined dialogue, manipulated chronologies and fictionalized events. This Court held as follows.

That is not to say, however, that his "personality" may be fictionalized and that, as fictionalized, it may be exploited for the defendants' commercial benefit through the medium of an

unauthorized biography. Spahn, 18 N.Y.2d at 328-329, 274 N.Y.S.2d at 879-880.

The case at bar merely substitutes “portrait” for “name”. In other words, though a novel or work of fiction may contain a fleeting reference to an actual “name” and not violate the statute, if defendant’s primary purpose in using plaintiff’s “name” or “portrait” is for commercial exploitation, the statute is violated under Spahn, Foster and all the other case law.⁵ In other words, use of her portrait on the cover and discs is an “advertisement in disguise” “having no real relationship” to whatever expressive point the author is trying to make because it is Ms. Lohan- nothing more.

When the courts define parody and satire, the plaintiff must be the target of the parody or satire in whole or in part such that the image is not plaintiff anymore, but is transformed into something else. In other words, to be a fair use the parody must conjure up the original Campbell, 510 U.S. at 588, 114 S. Ct. at 1176, and in the case of satire the original must at least be partly the target of the satire. Campbell, 510 U.S. at 597, 114 S. Ct. at 1180. Either way, the original is needed.⁶

⁵ However, if the portrait was an exaggerated parody of Ms. Lohan, GTAV’s argument might then be less nebulous as far as fitting into an exception. GTAV has not argued that here and the “portraits” are identical to Ms. Lohan so there is no parody of her nor does GTAV argue that there is a parody or satire of her.

⁶ GTAV specifically denies at R 104 that the two still images and the avatar and voice resemble, mimic or target Ms. Lohan thereby waiving a parody and satire defense as a permissible use outside the reach of the statute.

GTAV has waived any remaining hope of a New York Free Speech exception to “advertising or trade purpose” (*i.e.* newsworthy, public interest, transformative art and parody/satire/fiction exceptions to the statute) as parody/satire by definition require comment on the original which GTAV specifically denies at R 104 that the portraits, avatar and voice resemble or mimic Ms. Lohan or that she is at least in part a target of any expressive content the game may have. GTAV’s argument on page 33 that they are making a parody or satire about Hollywood life in general is irrelevant to Ms. Lohan’s claim firstly because the portraits are virtually identical in that they are as close as a digital drawing can get to a photograph so they have no satirical or parody elements of exaggeration as relates to Ms. Lohan’s actual photograph, and secondly because GTAV argues the portraits have no resemblance to Ms. Lohan (R 104) so GTAV cannot be making a parody or satire “expressive” comment about her no matter how many websites GTAV now sites for the first time which improperly dehors the record.

GTAV’s argument on pages 33-34 that digital avatar and voice and transition screen still portraits should be excluded from section 51 claims is entirely meritless because all of the New York case law over the past century supports the sustainability of Ms. Lohan’s claims as demonstrated *supra* even though GTAV says they have “powerful support” (GTAV Br. at 34) for the

dismissal they certainly do not provide any.⁷ As there are sustainable allegations that GTAV's intent when it produced these items was "advertising or trade purposes" as opposed to expression, the First Amendment and the New York State Constitution do not protect GTAV because none of the four statutory exceptions apply. Accordingly, the First Department erred in reversing the Supreme Court and the Amended Complaint should be reinstated.

II. THE SUMMONS AND COMPLAINT WERE TIMELY FILED WITHIN ONE YEAR OF EITHER REPUBLISHING THE "ADVERTISING" IMAGES IN A DIFFERENT FORMAT ON THE GAME DISCS OR THE GAME RELEASE STARTS A "TRADE" LIMITATIONS PERIOD

Ms. Lohan timely filed the Summons and Complaint on July 1, 2014 (R 7). It is well settled that a new publication arises when a subsequent publication is intended to and actually reaches a new audience, the subsequent publication is made on an occasion distinct from the initial one, the republished statement has been modified in form or content and the defendant has control over the decision to republish. Martin v. Daily News, 121 A.D.3d 90, 103-104, 990 N.Y.S.2d 473, 483-

⁷ The Free Speech exceptions to "advertising or trade purpose" (*i.e.* newsworthy, public interest, transformative art and parody/satire/fiction exceptions to the statute) incorporate within the "advertising or trade purpose" analysis whether the work is "advertisement in disguise" "with no real relationship" or "commercial exploitation" as opposed to Free Speech "expression". For complete federal analysis, see Hart v. Electronic Arts, 717 F.3d 141, 168-169 (3rd Cir. 2013), *cert. dismiss.* 135 S. Ct. 43 (2014) regarding any avatar altering features and other player interactivity which the avatars do not have in GTAV, and Florida Bar v. Went For It, 515 U.S. 618, 623, 115 S. Ct. 2371, 2375 (1995) and Bolger v. Youngs Drug Products, 463 U.S. 60, 65-68, 103 S. Ct. 2875, 2879-2881 (1983) for federal commercial Speech analysis.

484 (1st Dept. 2014). The classic example exists from the second offering of a novel in a paperback format. Etheredge-Brown v. American Media, 13 F. Supp. 3d 303, 306-307 (SDNY 2014). When the republication is intended to reach a new audience in a different format it is akin to repackaging a book from hard cover to paperback. Etheredge-Brown v. American Media, 13 F. Supp. 3d at 306-307 (2014). In essence, the republication exception applies for publications which are not merely a delayed circulation of the original edition. Geary v. Town Sports International Holding, 870 N.Y.S.2d 846, 847 (Sup. NY 2008) citing Firth v. State of New York, 98 N.Y.2d 365, 371, 747 N.Y.S.2d 69, 72 (2002).

In the case at bar the release of the images on game discs (R 34, 38) on September 17, 2013 (R 62) as a “trade” use is plainly a republication of the previously posted billboard (R 54-57) and internet (R 248) “advertising” images because it is a modified image in a different format that intentionally reaches a new audience that is not merely a delayed circulation of the original images. Indeed pre-release billboards, game guides and website hype are “advertising” and printing the images on the game discs and jacket is a “trade usage” under the statute which are distinctly separate claims utterly mandating a determination that the game release is not merely a delayed circulation of the original advertisements. The game was released on September 17, 2013 (R 62), the Complaint was timely filed within one year on July 1, 2014 (R 7), and process service was complete July

22, 2014 (R 239-246). GTAV does not and cannot dispute that republication on the game discs (R 34, 38) and on the dvd cover jacket (R 47) and in the transition screens (GTAV Br. at 11-12), are not different formats reaching actual purchasers (trade usage) as opposed to potential purchasers (advertising usage) purposely targeted with the GTAV's "Warehouse" website offering a collectible "Stop and Frisk" poster (R 248), a "Signature Series Guide" with the "Stop and Frisk" image on the front and back cover (R 249-250) sold separately from the game, and "Beach Weather" on bus stop and billboard postings prior to the game's release. (R 54-58). Clearly, such targeted marketing and advertising with a later release of the product itself containing modified images as a separate trade usage is not merely an uncontrollable delayed circulation of the original images. Rather, it is GTAV's calculated decision to publish or republish the images at different times, in different formats to reach different people, for different reasons and then again print the modified images (R 34, 38) on the game discs and other game materials when it was released.

GTAV's reliance on Hoosac Valley v. AG Assets, 168 A.D.2d 822, 563 N.Y.S.2d 954, 955 (3rd Dept. 1990) is entirely misplaced. In Hoosac there was no sustainable allegation of republication in plainly different formats as there is here (R 29) and as the Supreme Court properly found. (R 6, 29, 34, 38, 47, 49-53, 54-58, 248, 249-250, *i.e.* from building billboards reduced down and cropped on the

discs and disc jacket, and from the internet website to the game guide to the discs, then on coffee mugs and T-shirts).⁸ Most of the images in their modified condition are attached to the Amended Complaint and are plainly visible. Ms. Lohan has articulated a sustainable allegation of republication as held by the lower court (R 6). Indeed, on a motion to dismiss pursuant to CPLR 3211 (a)(5) on the ground that it is time barred, plaintiff's submissions in response must be given their most favorable intendment. Benn v. Benn, 82 A.D.3d 548, 918 N.Y.S.2d 465, 466 (1st Dept. 2011). Here, because the lower court specifically held that "defendants have not been able to prove at this juncture of the litigation, that the republication exception [] is not applicable" and "Plaintiff specifically alleges facts which contend otherwise" (R 6), the lower court simply found that Ms. Lohan met her burden on the limitations period properly giving her the benefit of every reasonable inferences. The lower court did not switch the burden as GTAV argues which is plainly evident any way that holding is read.

GTAV's reliance on Bondar v. LASplash Cosmetics, 2012 U.S. Dist. LEXIS 175873 at *24 (12 Civ. 1417, SDNY 2012), only bolsters Ms. Lohan's position. In Bondar, plaintiff's picture was used in a poster "advertising" campaign for lip

⁸ On page 15 note 5 of GTAV's opposition Brief, GTAV misrepresents both that "Ms. Lohan conceded to the Appellate Division that the merchandise referenced in the Amended Complaint is 'pirated unauthenticated merchandise from unrelated sources' that was not produced by Take-Two" and that "Ms. Lohan's current appeal is not directed to any merchandise". Ms. Lohan's Appellate Division Brief on page 38 used the word "affirm" which was short Affirmation for the conclusory and unsupported denial in Mr. Rosa's Affirmation (R 66) which he averred was pirated which merely would create a question of fact if GTAV serves a Verified Answer.

gloss, eye liner and eye shadow in cosmetic department stores beyond the one year limitations period. Plaintiff argued that when defendants left up the same posters and released a new eye shadow cream in the stores putting up more copies of the same poster, it was a republication because the same posters were used in connection with a new product. The Southern District rejected plaintiff's argument and held that because plaintiff's picture never appeared on any of the product packaging or containers, it was not a "trade usage" proscribed by the statute, but rather it was an "advertising usage" that plaintiff's complaint alleged regarding the same advertising poster that continually hung on the wall or additional poster copies were hung when the new product was released. Because nothing changed about the poster used to advertise both the old and new products, the court held that it was not a republication of the advertisements because nothing changed with them. The Court was clear that if Ms. Bondar's image also appeared on the new makeup containers themselves and she pled that, there is no doubt that it would have been considered a republication of the original poster image in a different format or it would have started the accrual of a one year "trade usage" limitations period in addition to the one year limitations for "advertising usage" already running from when the posters were hung in the department stores because "the statute of limitations runs separately as to each new product distributed with a

name or image, the use of which contravenes the statute.” Cuccioli v. Jekyll & Hyde Neue Metropol Theater, 150 F. Supp. 2d 566, 573 (SDNY 2001).

Bondar plainly holds that the statute of limitations on section 51 claims begins to run the first time an offending item is published or distributed but the limitations period is refreshed if an item is republished when a subsequent publication (1) is intended for and reaches a new audience *or* (2) materially changes or modifies the original. Bondar, 2012 U.S. Dist. LEXIS 175873 at *24. Regarding the first prong, the billboard and other advertisements containing the “portraits” referenced in the Amended Complaint paragraph 83 (R 30) obviously is directed at potential purchasers and the Amended Complaint paragraphs 74-75 (R 29) obviously is directed at those who have purchased the game then see the plainly modified “portraits” on the discs, the disc jacket and within the game on the two transition screens which is intended to be a different audience *i.e.* potential purchasers as opposed to actual purchasers. The audience of potential purchasers that see the “advertisement” is much larger than the actual purchasers who purchase the game and see the modified images therein.

GTAV cannot credibly argue otherwise as we all see advertisements forced on us but most often never see the packaging or the product. It is impossible to state that advertisements are intentionally directed at those who purchased the game as there is no possible way of knowing exactly who purchased the game

when the advertisements are made. Rather the advertisements are directed at those who are most likely to purchase the game. The two audiences are simply different-potential purchasers and actual purchasers. As the first Bondar republication element is satisfied, there is no need to consider the second prong as it is in the disjunctive. Bondar at *24.

Nevertheless, the second prong is also satisfied as the very purpose of putting the portraits on and in the game is a drastic modification of the size, resolution and cropping of the images. For example compare game disc 2 at R 34 with the internet poster portrait of Ms. Lohan at R 248. Apart from being drastically different sizes, cropping and resolution, the game disc 2 portrait cuts off the tops of the heads and legs, moves the GTAV lettering from the bottom left to the center, does not include the hood of the car, does not include Ms. Lohan's left hand and bracelet, contains PAL Microsoft xbox 360 lettering in the center, has a hole for the dvd drive and decorative corona in the center cutting out Ms. Lohan's right shoulder and upper right arm as well as the Officer's left shoulder and game disc 2 has additional logos at the top. The same is true for "Beach Weather" compare R 146, 73, 74, 75 with game disc 1 at R 38 where the GTAV logo is moved from bottom left to the top left, Playstation 3 logo is added at bottom, the boardwalk and amusement rides are not there from the resolution reduction and the disc has a hole for the dvd drive in the middle blocking a portion of the bikini top

among other wording and logo differences. Moreover, the disc jacket at R 47 is from the opposite angle and she is holding the phone in her right hand as opposed to holding it in her left at R 146 in the alleged clock start date image which is in fact not just cropped, reduced and resolution changed, but rather it is from a completely different angle and pose. These are material changes or modifications. In addition, GTAV does not establish *prima facie* the clock start date for the limitations period regarding “voice” because R 146 and R 154 only apply to the two transition screen still images- not the avatar.

Here, under Cuccioli and Bondar, the statute of limitations was either renewed by republication in a different format on September 17, 2013 from billboard and internet advertising to the discs’ face (R 34, 38) with the game’s release or the game’s release started a separate “trade usage” claim because the image was now modified and released on the game discs and jacket themselves which theoretically is considered a separate claim because it involves another independent element of the statute- “trade” as opposed to “advertising”. Either way, the Supreme Court was correct in denying GTAV’s motion to dismiss on the limitations period because there are sustainable allegations and inferences of the Martin elements- intent, distinct, modified and control. GTAV’s argument that the one year statute of limitations bars Ms. Lohan’s claims is meritless.

Any way it is reviewed, Ms. Lohan has reasonably alleged a timely and sustainable cause of action under sections 50 and 51. Accordingly, GTAV's motion to dismiss the Amended Complaint pursuant to CPLR 3211(a)(5) should be denied in its entirety.

III. DISCOVERY IS REQUIRED ON *IN PERSONAM* JURISDICTION OVER ROCKSTAR NORTH

Discovery is required to determine whether Rockstar North is subject to *in personam* jurisdiction in New York and (GTAV) Rockstar North's motion to dismiss pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction was properly denied. In situations of complex corporate relationships and where the relevant facts are exclusively in possession of the party seeking dismissal, the party opposing dismissal is not required to demonstrate a *prima facie* case of *in personam* jurisdiction, but rather must merely show that facts "may exist" to warrant discovery on the issue. Peterson v. Spartan, 33 N.Y.2d 463, 466-467, 354 N.Y.S.2d 905, 907-908 (1974), Banham v. Morgan Stanley, 178 A.D.2d 236, 576 N.Y.S.2d 876, 878 (1st Dept. 1991). In Banham, the First Department reversed the Supreme Court's dismissal of plaintiff's alleged breach of employment contract claim having sued an entity related to the employer holding that plaintiff is only required to demonstrate that facts "may exist" that there is an interlocking relationship between the entities to defeat the motion which for example can be

established by supervising employees working for both entities warranting discovery on the issue. In addition, agency between parent and subsidiary entities may be sufficient to demonstrate that an entity is sufficiently present in New York to warrant personal jurisdiction which also requires discovery when there are complex corporate relationships and the relevant facts are in defendants' exclusive possession. Amsellem v. Host Marriott, 280 A.D.2d 357, 721 N.Y.S.2d 318 (1st Dept. 2001).

In the case at bar, a simple review of GTAV's website (R 253) www.rockstargames.com/careers/openings/rockstar-north demonstrates offices in the United Kingdom, Canada and the United States including New York City which reasonably could be sufficient to warrant personal jurisdiction over Rockstar North in New York, and there is a reasonable agency question regarding the GTAV entities because they are plainly affiliated and they share the same website probably sharing many of the same officers, supervising employees and directors. As all of the relevant facts are within GTAV's exclusive possession, discovery is required to determine whether Rockstar North is entitled to a dismissal for lacking personal jurisdiction.

Though GTAV argues on page 35 of their opposition Brief that the New York City Office belongs to a separate and distinct entity in the "Rockstar Games corporate family", the web page at R 253 plainly demonstrates otherwise in that

the web page address bar states “/rockstar-north” with the drop-down list further stating “Locations and Studios” “Rockstar NYC”. (R 253). GTAV’s unsupported and conclusory statement that “those offices belong to separate and distinct entities in the Rockstar Games corporate family” is incorrect because the drop-down list is appearing on the “/rockstar-north” page portion of the web page plainly demonstrated in the right of the address bar. GTAV’s unsubstantiated attorney conclusion is contradicted by GTAV’s own web page demonstrating that Rockstar North has contacts with New York through its Rockstar NYC location. Moreover, there is no separate entity called “Rockstar NYC” on GTAV’s Corporate Disclosure Statement (GTAV Br. at 1-2).

GTAV’s reliance on Benefits by Design v. Contractor Mgmt., 75 A.D.3d 826, 829-830, 905 N.Y.S.2d 340, 344 (3rd Dept. 2010) is misplaced. In Benefits there was a web page from an out of state company where the web page was simply viewable by a computer user in New York and had nothing to do with any potential contacts in New York. GTAV’s web page on its face shows Rockstar North holds itself out as having contacts in New York. Leonard v. Gateway II, 68 A.D.3d 408, 408-410, 890 N.Y.S.2d 33, 35-36 (1st Dept. 2009) dealt with the heightened pleading requirements on fraud in the inducement regarding a contract which the responsible defendant would be the defendant executing the contract as that defendant was in privity and the improper conduct would be beyond the scope


of any agency that could have existed. Ms. Lohan is not looking for the “unsubstantiated hope of discovering something relevant” but rather she is looking for “a more accurate judgment” as is her right under Peterson. Accordingly, the Supreme Court properly denied GTAV’s 3211(a)(8) motion to dismiss regarding Rockstar North.

CONCLUSION

For the foregoing reasons, plaintiff-appellant respectfully requests that the First Department Order entered September 1, 2016 dismissing the Amended Complaint be vacated, and the Amended Complaint be reinstated.

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Monaco & Monaco, LLP
Of Counsel to The Pritchard Law Firm
7610 13th Avenue, 2nd Floor
Brooklyn, New York 11228
(718) 872-0533
law@attorneysmonaco.com
fadd@verizon.net

By: 
Frank A. Delle Donne, Esq.

Robert O. Pritchard, Esq.
Attorneys for Plaintiff-Appellant
30 Wall Street, 8th Floor
New York, New York 10007
(212) 859-5027
rop@pritchardlawfirm-nyc.com

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