

III. RECHTSPRECHUNG

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
Case No. 13-CV-05612(FB)(RLM)
12.02.2018 – GRAFFITI IST AUCH
AUF FREMDEN EIGENTUM GE-
SCHÜTZE KUNST**

Vier Jahre nachdem der Eigentümer eines Lagerhauskomplexes in New York dieses weiß überstreichen ließ und damit mehrere Graffiti entfernte, wurde er nun dazu verurteilt eine Entschädigung in Höhe von insgesamt \$6,750,000.00 an mehrere Künstler zu zahlen.

Für Graffiti-Künstler und Begeisterte von Street-Art Kunst galt das „5Pointz“ als Hochburg und Treffpunkt der Szene. Der Eigentümer, Jerry Wolkoff, hatte den Künstlern jahrelang freie Hand gelassen, bis er den Entschluss fasste, den Komplex abzureißen und an seiner Stelle Luxuswohnungen zu bauen. Daher ließ er die Graffiti ohne Vorwarnung über Nacht mit weißer Farbe überstreichen.

Eine Künstler-Gruppe unter Anführung von Jonathan Cohen klagte gegen die Entfernung der Graffiti. Dabei stand die Frage im Mittelpunkt des Prozesses, ob die Graffiti trotz ihrer Vergänglichkeit als Kunst gelten und deshalb nicht hätten übermalt werden dürfen.

Der Prozessausgang ist insofern interessant und wegweisen für zukünftige Prozesse in denen Graffiti streitgegenständlich sein werden, als dass entschieden wurde, dass Graffiti nach amerikanischem Recht Kunst sein können und Schutz auch dann genießen, wenn sich die Graffiti auf fremdem Eigentum befinden.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK -

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Case No. 13-CV-05612(FB)(RLM)

JONATHAN COHEN, SANDRA FABARA, STEPHEN EBERT, LUIS LAMBOY, ESTEBAN DEL VALLE, RODRIGO HENTER DE REZENDE, DANIELLE MASTRION, WILLIAM TRAMONTOZZI, JR., THOMAS LUCERO, AKIKO MIYAKAMI, CHRISTIAN CORTES, DUSTIN SPAGNOLA, ALICE MIZRACHI, CARLOS GAME, JAMES ROCCO, STEVEN LEW, FRANCISCO FERNANDEZ, and NICHOLAI KHAN,

Plaintiffs,

-against-

DECISION

G&M REALTY L.P., 22-50 JACKSON AVENUE OWNERS, L.P., 22-52 JACKSON AVENUE, LLC, ACD CITIVIEW BUILDINGS, LLC, and GERALD WOLKOFF,

Defendants.

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MARIA CASTILLO, JAMES COCHRAN, LUIS GOMEZ, BIENBENIDO GUERRA, RICHARD

MILLER, KAI NIEDERHAUSEN, CARLO NIEVA, RODNEY RODRIGUEZ, and KENJI TAKABAYASHI,

Plaintiffs,

-against-

G&M REALTY L.P., 22-50 JACKSON AVENUE OWNERS, L.P., 22-52 JACKSON AVENUE, LLC, ACD CITIVIEW BUILDINGS, LLC, and GERALD WOLKOFF,

Defendants.

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BLOCK, Senior District Judge:

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This marks the latest chapter in the ongoing saga of what has commonly become known as the 5Pointz litigation. Plaintiffs, 21 aerosol artists, initiated this lawsuit over four years ago by seeking a preliminary injunction under the Visual Artists Rights Act of 1990 (“VARA”), 17 U.S.C. § 106A, against defendants Gerald Wolkoff (“Wolkoff”) and four of his real estate entities to prevent the planned demolition by Wolkoff of his warehouse buildings in Long Island City and consequent destruction of plaintiffs’ paintings on the walls of the buildings.

I

¹ Seitenzahlen von der Redaktion nicht angepasst.

On November 12, 2013, after a hearing, the Court issued an order denying preliminary injunctive relief and stating that “a written opinion would soon be issued.” ECF No. 34. Rather than wait for the Court’s opinion, which was issued just eight days later on November 20th, Wolkoff destroyed almost all of the plaintiffs’ paintings by white-washing them during that eight-day interim.

In its extensive opinion the Court initially noted that Wolkoff’s buildings “had become the repository of the largest collection of exterior aerosol art . . . in the United States” and that this litigation “marks the first occasion that a court has had to determine whether the work of an exterior aerosol artist—given its general ephemeral nature—is worthy of any protection under the law.” *Cohen v. G & M Realty L.P.*, 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013) (“*Cohen I*”).

In denying the plaintiffs’ application for preliminary injunctive relief, the Court recognized that the rights created by VARA were at tension with conventional notions of property rights and tried to balance these rights. It did so by not interfering with Wolkoff’s desire to tear down the warehouses to make way for high-rise luxury condos, but cautioned that “defendants are exposed to potentially significant monetary

damages if it is ultimately determined after trial that the plaintiffs’ works were of ‘recognized stature’” under VARA. *Cohen I*, 988 F. Supp. 2d at 227.

The trial has now happened. It lasted three weeks. At plaintiffs’ insistence, it was tried before a jury, but just prior to summations, plaintiffs—with defendants’ consent—waived their jury rights. Rather than summarily dismiss the jury after it had sat through the entire trial, the Court converted it to an advisory jury. During its charge, the Court carefully explained the parties’ rights and obligations under VARA, including the plaintiffs’ entitlement to substantial statutory damages if the jury determined that Wolkoff had violated plaintiffs’ VARA rights and that he had acted willfully. On a 98-page verdict sheet, the jury found liability and made various damage awards in respect to 36 of plaintiffs’ 49 works of art that were the subject of the lawsuit. In every case they found that Wolkoff had acted willfully.

Although the Court does not agree with all of the jurors’ findings, it does agree that Wolkoff willfully violated plaintiffs’ VARA rights in respect to those 36 paintings. The Court further finds that liability and willfulness should attach to an additional nine works.

Given the abject nature of Wolkoff's willful conduct, the Court awards the maximum statutory damages under VARA for each of the 45 works of art wrongfully and willfully destroyed in the combined sum of \$6,750,000.²

II

A. The Relevant Statutory Framework

As the Court explained in *Cohen I*, "VARA amended existing copyright law to add protections for two 'moral rights' of artists: the rights of *attribution* and *integrity*." *Cohen I*, 988 F. Supp. 2d at 215. VARA has codified the right to integrity to provide "the author of a work of visual art" the right

(A) to prevent any intentional destruction, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

17 U.S.C. § 106A(a)(3).

Thus, in *Cohen I*, the Court held that plaintiffs' aerosol art comes under VARA's protection as works of "visual art", *Cohen I*, 988 F. Supp. 2d at 216, and that, under § 106A(a)(3)(B), VARA "gives the 'author of a work of visual art' the right to sue to prevent the destruction of [the] work if it is one of 'recognized stature,'" *Cohen I*, 988 F. Supp. 2d at 215. VARA also permits the artist to seek monetary damages under § 106A(a)(3)(A) if the work was distorted, mutilated, or otherwise modified to the prejudice of the artist's honor or reputation.

Section 113(d)(1) of VARA provides that

In a case in which –

(A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), and

² This decision constitutes the Court's combined findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

(B) the author consented to the installation of the work in the building either before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal, then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply.³

Section 113(d)(2) provides, in part, that

If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, mutilation, or other modification of the work as described in section 106A(a)(3), the author's rights under paragraphs (2) and

(3) of section 106A(a) shall apply unless—

(A) the owner has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the work of visual art, or

(B) the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.

Thus, § 113(d) provides for two possibilities when a protected work of art has been integrated into a building subsequent to June 1, 1991, VARA's effective date. "Section 113(d)(1) deals with works of visual art that *cannot be removed* without causing destruction, mutilation, or other modifications to the work. Section 113(d)(2) deals with works of visual art that can be removed without causing such harm." 5 William F. Patry, *Patry on Copyright* § 16:32 (2017) ("*Patry*") (emphasis added).⁴

³ Paragraph (2)—not applicable in this case—protects the right of attribution by affording the artist "the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other

modification of the work which would be prejudicial to his or her honor or reputation[.]"

⁴ Patry participated in the drafting of VARA in his role as a Policy Planning Advisor to the Register of Copyrights. Patry § 16:1 n.1.

Under § 113(d)(1), if a work is *not removable* without destroying, mutilating, distorting, or otherwise modifying the work, the artist's VARA right of integrity under § 106A(3) attach, and the artist may sue to prevent the destruction of the work unless the right is waived "in a *written instrument . . . that is signed by the owner of the building and the author* and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal." § 113(d)(1)(B) (emphasis added).

Under § 113(d)(2), if a work is *removable* without destroying, mutilating, distorting, or otherwise modifying it, VARA gives the artist the opportunity to salvage the work upon receipt of a 90 days' written notice from the building owner of the owner's "intended action affecting the work of visual art." 17 U.S.C. §§ 113(d)(2)(A)-(B). If the artist fails to remove or pay for the removal of the works within the 90 days—or if the owner could not notify the artist after making a "good faith effort," 17 U.S.C. § 113(d)(2)(A)—the artist's VARA rights are deemed waived for the removable work, and the owner may destroy them without consequences.⁵

Accordingly, the Court accords his treatise, which is highly regarded on all copyright issues, particular weight when examining provisions of VARA.

Damages that may be awarded for the violation of the artist's rights of attribution and integrity under § 106A(a)(3) are the same that apply for copyright infringement, namely actual (including profits) and statutory. 17 U.S.C. § 504(a). As the House Judiciary Committee Report explained:

Section 6(a) of the bill simply amends section 501(a) of title 17 to add those authors covered by new section 106A It thereby makes all title 17 remedies [except criminal sanctions] available to those authors [VARA] thereby provides for monetary damages, and for injunctive relief to prevent future harm. *The same standards that the courts presently use to determine whether such relief is appropriate for violations of section 106 rights will apply to violations of section 106A rights as well.*

H.R. Rep. No. 101-514, at 21-22 (1990) (emphasis added).

There is no limit to the amount of actual damages for each work, but statutory damages for each may be "not less than \$750 or more than \$30,000 as

⁵ Section 113(d)(2)(B) also provides that if the artist successfully removes a work at his or her own expense, title to the work passes automatically to the artist. See 17 U.S.C. § 113(d)(2)(B).

the court considers just.” 17 U.S.C. § 504(c)(1). If, however, the plaintiff “sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages” for each work “to a sum of not more than \$150,000.” 17 U.S.C. § 504(c)(2). The plaintiff is not entitled to both actual and statutory damages but must elect one or the other “before final judgment is rendered[.]” 17 U.S.C. § 504(c)(1).

B. The Advisory Jury

“A proper demand [for a jury trial] may be withdrawn only if the parties consent.” Fed. R. Civ. P. 38(d). Here the defendants, through counsel, consented to submitting the case to the Court.

Under the federal rules, where the right to a jury trial does not attach, “the court, on motion or on its own: (1) may try any issue with an advisory jury[.]” Fed. R. Civ. P. 39(c). “Because advisory juries permit community participation and may incorporate the public’s views of morality and changing common law, their use is particularly appropriate in cases involving community-

based standards.” *NAACP v. Acusport Corp.*, 226 F. Supp. 2d 391, 398 (E.D.N.Y. 2002) (Weinstein, J.).

“[A district court] is not bound by the findings of the advisory jury, which it is free to adopt in whole or in part or to totally disregard[.]” *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 907 (2d Cir. 1993) (quoting *Sheila’s Shine Prods., Inc. v. Sheila Shine, Inc.*, 486 F.2d 114, 122 (5th Cir. 1973)). “[T]he court retains the ultimate responsibility for findings of fact and conclusions [of law] . . . in reliance upon the advisory jury’s verdict if the court so chooses, and to explain how it arrived at those findings and conclusions.” *De-Felice v. Am. Int’l Life Assurance Co. of New York*, 112 F.3d 61, 65 (2d Cir. 1997).

Under these principles, the Court will take the jury’s verdicts under advisement in making its independent findings of fact and conclusions of law, especially on issues that require judgment of the community.⁶

The Court would be remiss if it did not pause to acknowledge the extraordinary work of the eight jurors. Rarely were they late during the course

⁶ During the trial and in their post-trial brief, defendants argued that several comments by the Court, and the Court’s rejection of defendants’ requested jury instructions, prejudiced the jury to the point of requiring a mistrial. The Court disagrees for the reasons stated on the record at

the time of the objections. However, even assuming arguendo that the jury had been prejudiced, because the jury was advisory, and the Court is making its own findings of fact and conclusions of law, any prejudice would have been harmless.

of the extensive trial, and the Court was impressed with their rapt attention to the difficult task that awaited them in having to assess the defendants' liability in respect to each of the 49 works of art. Since the jurors had spent the better part of a month in anticipation of deliberating, the Court was disinclined to summarily dismiss them when, at the veritable 11th hour, the plaintiffs suddenly decided to convert the case to a bench trial. Moreover, since 5Pointz had achieved worldwide community recognition, the Court was keen to learn whether the jurors, as members of the community, would view the works as having achieved recognized stature under VARA. To enhance the integrity of their verdicts, the Court decided it best not to tell the jurors that their findings would only be advisory.

The complexity of the litigation did not deter the jurors from making individualized findings in respect to each of the 21 artists and their 49 works on the 98-page verdict sheet. They were tasked with having to determine whether each destroyed work was of recognized stature and/or was mutilated, distorted, or otherwise modified to the prejudice of the artist's honor or reputation by the whitewashing. They

found that 28 of the 49 destroyed works had achieved recognized stature, and eight more had been mutilated, distorted, or otherwise modified to the prejudice of the artists' honor or reputation.⁷ Each of the 21 plaintiffs were adversely affected in one way or the other, and the jury had to individually assess whether actual and statutory damages were warranted in regard to each work. It awarded a total of \$545,750 in actual damages and \$651,750 in statutory damages.

C. The Witnesses and Evidentiary Landscape

Each of the 21 plaintiffs/artists testified; they were respectful, articulate and credible. Folios for each were admitted into evidence collectively containing their professional achievements and recognition in the form of an impressive array of fellowships, residences, public and private commissions, teaching positions, media coverage, and social media presence. Not surprisingly, each of the 21 Folios contained beautiful color prints of the artists' respective aerosol works of art which are the subject of the lawsuit. They are appended to this opinion. It is apparent that they reflect striking technical and artistic mastery and vision

⁷ The jury also found that of the 28 works of recognized stature that were destroyed, 20 had also been mutilated, modified, distorted or

otherwise modified in a manner prejudicial to the artist's honor or reputation.

worthy of display in prominent museums if not on the walls of 5Pointz. The Folios also contain photos showing how almost all of these works of art were partially or wholly whitewashed by Wolkoff.

5Pointz was an egalitarian place. The artists came from many backgrounds. Some of the plaintiffs testified via Skype from international residences. Many who live in New York had immigrated from other countries to join the 5Pointz community. One artist flew from London to testify; another came of age in rural West Virginia. Some artists came from highly prestigious art schools; others were self-taught. Some were fixtures in elite, traditional art circles; others were simply dedicated to street and community art. The Court was impressed with the breadth of the artists' works and how many of the works spoke to the social issues of our times.

The principal testimony about the advent, evolution and demolition of 5Pointz came from plaintiff Jonathan Cohen, one of the world's most accomplished aerosol artists. Wolkoff had designated Cohen as 5Pointz's *de facto* curator, appointing him to run the site and pick the works he thought were of merit: "I gave him permission, plain, Jonathan, you are in charge, bring whoever you

think is right to come and display their work on my building." Tr. at 2025:4-8.

In addition to the artists, three experts testified for the plaintiffs. Renee Vara, a certified art appraiser, former head fine art expert at Chubb Insurance and art professor at New York University, testified to the quality and recognized stature of the works; Elizabeth Littlejohn, an art appraiser certified through the Appraisers Association of America, testified to their appraisal value; and Harriet Irgang Alden, the chief paintings conservator at Art Care NYC, testified as to the removability of each of the artworks from the 5 Pointz walls.

Plaintiffs also called two fact witnesses. Angelo Madrigale, Vice President and Director of Contemporary Art at Doyle New York, an auction house, wrote a letter upon which Vara relied in formulating her report. He testified to the artistic importance of the works. Lois Stavsky developed a 5Pointz exhibit for Google Arts and Culture and testified to the creation of that exhibit and why Google believed that 5Pointz was a culturally significant site.

Wolkoff was the defendants' principal witness. He testified to his rise from a poor childhood to become a successful real estate developer and explained his role in the advent and

success of 5 Pointz. He was adamant that the artists knew that the day would come when the warehouse buildings bearing their works of art would come down and be replaced by high-rise residential condos.

Although the Court believes that Wolkoff in the main testified truthfully, he was a difficult witness. He frequently ignored or challenged instructions by the Court. He was argumentative and prone to tangents and non-responsive answers. Eliciting coherent testimony was a chore and was only achieved after the Court threatened to hold him in contempt. See, e.g., Tr. at 2033:18-2034:2; 2036:19-2037:24; 2045:23-2047:6; 2087:22-2088:13; 2092:13-22.

In addition to Wolkoff, two experts testified for the defendants. Erin Thompson, a professor of art history at the City University of New York and practicing art lawyer, testified as to the issue of recognized stature, and Christopher Gaillard, a fine art appraiser with the art appraisal and acquisition firm Gurr Johns, testified as to the works' appraisal value.

The story of 5Pointz that follows comes primarily from the lips of Cohen and Wolkoff.

III

A. The Advent and Evolution of 5Pointz

What became 5Pointz originated as Phun Phactory in the early 1990s. The warehouses were largely dilapidated and the neighborhood was crime infested. There was no control over the artists who painted on the walls of the buildings or the quality of their work, which was largely viewed by the public as nothing more than graffiti. This started to change in 2002 when Wolkoff put Cohen in charge. Cohen and several other artists also rented studio space in the warehouse buildings. Collectively, they worked to improve conditions. As Cohen explained:

We took it upon ourselves to clean the loading dock. . . . The dumpsters were overflowing. We took it upon ourselves, we hired his employees, we paid for the lighting. We put motion sensors up so that when you came to the loading dock it was inviting. It actually drew you in as opposed to scaring you away.

Id. at 1448:20-1449:3.

Wolkoff recognized the merit of the art. As he acknowledged: "I liked it and they did more and more and I thought it was terrific. They were expressing themselves." *Id.* at 2082:4-5. And he approved of the job Cohen did in curating the art: "I have no feelings even today against Jonathan Cohen. I

thought he was terrific handling my building. . . . Anything to do with art I left up to Jonathan. He had good taste in the artists that came there.” *Id.* at 2086:13-17.

Until Wolkoff decided over a decade later that the economic climate was ripe to convert the site into luxury condos, he and Cohen had a copacetic relationship.

But nothing was ever reduced to writing and Wolkoff only verbally laid out three rules for what could be put on the walls: no pornography, no religious content, and nothing political. In his role, Cohen established a system of rules for both the creation and curation of the art, spending seven days a week without pay to bring 5Pointz to fruition.

Cohen oversaw the site, kept it clean and safe, allotted wall space, and explained the site’s rules and norms to new artists. Over time, crime in the neighborhood dropped and the site became a major attraction drawing thousands of daily visitors, including busloads of tourists, school trips, and weddings. Movie, television, and music video producers came; it was used for the 2013 motion picture *Now You See Me*, starring Jesse Eisenberg and Mark Ruffalo, and was the site of a notable tour for R&B singer Usher.

As the plaintiff Castillo explained, “street art became a new form,” which “now has become an industry.” Tr. at 202:6, 202:10. And 5Pointz became “this outdoor museum where kids can touch the wall, and . . . you can’t do that at a museum. You can’t go and touch a Van Gogh or like a Mona Lisa.” *Id.* at 202:2-5.

Wolkoff had nothing to do with day-to-day operations. Under Cohen’s control, he witnessed his buildings emerge as a mecca for the world’s largest collection of quality outdoor aerosol art.

B. The Walls

1. Covering

5Pointz was a site of creative destruction; most artworks had short lifespans and were repeatedly painted over by successive artists. The rules behind covering were important; as virtually every artist testified, “going over” someone else’s piece without permission was a sign of disrespect that could cause conflicts. Going over another piece partially or sloppily was another insult. As Cohen explained:

[Y]ou respect your wall, you clean up when you’re done, you cover what you go over completely. If you do not cover what you went over, you do not last. That was rule number one.

Respect in our game is everything, and if you don't have respect then you don't get respect.

Tr. at 1443:15-22. As a result, Cohen established an elaborate system of rules and norms governing how long pieces would remain and when a piece could be covered by a new artwork. As he testified:

THE COURT: Let me ask you a question. Can anybody paint over your paintings without your permission, aside from vandalism?

A: No. Everything was done with permission and there was a system that grew over the period of time I was there. You know, we perfect as we go along.

Id. at 1423:18-23.

2. Short-Term Rotating Walls vs. Long-Standing Walls

5Pointz was organized into short-term rotating walls and long-standing walls. The short-term walls would change on a daily or weekly basis. As Cohen explained: "There were allocated spaces that were for straight beginners that had no idea how to paint. And those, I would say you could utilize the space, but it more than likely will be gone tomorrow or the next day or whatever." *Id.* at 1441:18-22. "Short-term rotating walls, it was communicated up

front so they'd know you could have several weeks or whatever." *Id.* at 1444:13-15.

On the other hand, pieces on long-standing walls were more permanent, although a high-quality piece could achieve permanence even if not initially placed on a long-standing wall; but an artist's reputation was not sufficient to secure longstanding status. As Cohen further explained:

[T]he prime real estate that faces the train were the most sought after spots to paint and those went to more advanced writers. You've got to understand, as well, because you are an advanced writer doesn't mean that you are going to perform on an advanced level. You may just want to blow off steam one afternoon, but that doesn't mean your piece should last a long time. And you could be a beginner and do the performance of your lifetime and produce a piece that is so amazing that it's decided it will stay.

Id. at 1441:22-7. 19

While Cohen had the final say as to the duration of the pieces, he always spoke with the artists about their planned lifespan and eventual replacement. As he testified: "For long term

productions, where people invested time and money, I would communicate with them. I would reach out to them. In some instances, I would tell them to come back and actually egg them on to do something real better. As the bar got raised, everybody performed better.” *Id.* at 1444:14-19.

In other words, 5Pointz operated not just as a creative space, but a competitive place. Artists would compete to outdo one another and earn prominent placement on a long-standing wall. In addition to the walls facing the passing 7 train, which were seen by millions of commuters, the artists prized the walls near the loading docks, which had the most foot traffic, and the walls inside the buildings, which were generally long-standing. While as many as 10,000 works were destroyed while Cohen was in charge, it was not anarchy. Most of the best works by the best artists achieved permanent or semi-permanent placements on the long-standing walls.

C. The Planned Demolition

Starting in 2011, rumors that Wolkoff had plans to shut down 5Pointz and turn it into luxury condos began to concern the artists. In May 2013, the rumors became reality: Cohen learned

that Wolkoff had started to seek the requisite municipal approvals for his condos.

Hoping to save 5Pointz, Cohen filed an application with the City Landmark Preservation Commission to preserve the site as one of cultural significance. It was denied because the artistic work was of too recent origin. See Letter from NYC Landmarks Preservation Commission, August 20, 2013, ECF No. 31.

Cohen also sought funding to buy the property, which had been valued at \$40 million. However, this fell through in October 2013 when Wolkoff obtained a necessary variance, instantly raising the property value to more than \$200 million. The higher price was out of reach of Cohen’s potential investors. Plaintiffs then initiated this litigation to enjoin Wolkoff from destroying 5Pointz.

D. The Whitewashing

As soon as the Court denied the plaintiffs’ application for preliminary injunction, Wolkoff directed the whitewashing of virtually all the artwork on the 5Pointz site with rollers, spray machines, and buckets of white paint.⁸

The whitewashing was inconsistent. Some works were completely

⁸ Some other colors were sporadically used, including black and blue paint, but the vast

majority of the whitewashing was done with white paint.

covered in white paint. Others were only partially covered. Some were fully covered, but by such a thin layer of paint that the artwork was easily visible beneath the paint. What was consistent was that none of the covered works was salvageable. And plaintiffs were no longer allowed on the site, even to recover the scattered remnants of their ruined creations.

Since their works were effectively destroyed,⁹ plaintiffs were relegated to seeking monetary relief under VARA.

IV

A. Temporary Works of Art

Defendants' overarching contention is that plaintiffs knew that the day would come when the buildings would be torn down and that, regardless, the nature of the work of an outdoor aerosol artist is ephemeral.¹⁰ They argue,

therefore, that VARA should not afford plaintiffs protection for their temporary works.¹¹

VARA does not directly address whether it protects temporary works. However, in the context of works on buildings, it is clear from 17 U.S.C. § 113(d) that temporary works are protected. Moreover, relevant case law conceptually supports this conclusion. In short, there is no legal support for the proposition that temporary works do not come within VARA's embrace.

First, § 113(d)(1) specifies that an unremovable work incorporated in a building is protected by VARA unless the artist waives his or her rights in a writing signed by both the artist and the building owner. If the building owner could orally inform the artist that the building is coming down someday, and thereby convert the work into an

⁹ The Court notes that one work, Richard Miller's *Monster II*, survived the whitewashing but was later destroyed by a backhoe. The plaintiffs did not have direct evidence of whitewashing for seven others because the works were inside a building to which they had no access after the whitewashing—Jonathan Cohen's *Character and Inside Wildstyle*, Luis Gomez's *Inside King Kong*, Richard Miller's *Monster I*, and Luis Lamboy's *World Traveler*, Logo for Clothing Brand aka *Monopoly Man*, and *Electric Fish*. However, several plaintiffs testified that they believed the inside works were destroyed in the whitewashing, and the Court credits the plaintiffs' testimony that they were not allowed onto the property to retrieve the works after the whitewash and were threatened with arrest if they tried.

¹⁰ While Cohen acknowledged that he knew that Wolkoff intended to eventually tear down the buildings to make way for his new condos, other plaintiffs testified that they had no such

knowledge. Regardless, even if the artists were allowed to waive their VARA rights orally (which they were not), none of the other artists ever spoke to Wolkoff. As he acknowledged at trial: "I didn't know any of the artists. I only dealt with Jonathan Cohen." Tr. at 2023:16-17.

¹¹ Defendants also assert the affirmative defense of "abandonment." It is meritless since it only affects ownership of the work's copyright. See *Capitol Records, Inc. v. Naxos of America, Inc.*, 372 F.3d 471, 483 (2d Cir. 2004) (holding "abandonment of *copyright* requires "(1) an intent by the *copyright holder* to surrender rights in the work; and (2) an overt act evidencing that intent." (emphasis added)). Defendants have not pointed to any overt act showing an intent to abandon ownership. Quite the opposite: The moment the artists learned of defendants' intent to destroy their works, they began legal proceedings to save them. This was the antithesis of abandonment.

unprotected temporary work, the written consent provision would be rendered nugatory. As the House Judiciary Committee Report explains: “The purpose of [the written waiver] is to ensure that the author is made fully aware of the circumstances surrounding the installation and potential removal of the work and has nevertheless knowingly subjected the work to possible modifications that would otherwise be actionable under section 106A.” H.R. Rep. No. 101-514, at 21. And as Patry adds: “In light of this provision’s purpose of ensuring that artists be made aware fully of the circumstances surrounding installation and potential destructive removal, it should be strictly construed.” *Patry* § 16:33.

Second, § 113(d)(2), specifying that artists are entitled to 90 days’ written notice to allow them to salvage their removable works, contemplates that such works may be temporarily on the side of a building. Thus, VARA resolves the tension between the building owners’ rights and the artists’ rights through § 113(d), not by excluding temporary works from protection.

Of the limited available case law, *Board of Managers of Soho International Arts Condominium v. City of New*

York, 2003 WL 21403333 (S.D.N.Y. June 17, 2003) perhaps best illustrates this point. There, an artist sought to prevent his work from being permanently removed from the wall of a condo under VARA. There was conflicting testimony as to whether the work was intended to be kept on the wall permanently or temporarily. Nonetheless, the Court, in denying summary judgment, held VARA only allowed the artist to remove the mural, not keep it in its place. The court rejected the artist’s argument that removal was “tantamount to the Work’s destruction” as “[n]owhere in the [dictionary] definition of ‘remove’ does the temporality of the act of removal arise.” *Id.*, at *10. Therefore, it was “clear to the Court that what Congress intended in bifurcating § 113(d)’s protections was to separate removal situations based not on the temporality of the removal but on the *consequences* of the removal.” *Id.*¹²

Thus, VARA draws no distinction between temporary and nontemporary works on the side of a building, particularly when all that makes a work temporary is the building owner’s expressed intention to remove or destroy it. VARA protects such works; how it protects them is governed by the carefully

¹² A key difference between *Board of Managers* and this litigation is that the Board of Managers artwork was installed before VARA was enacted. This meant that the § 113(d)(1) written waiver provision did not apply in that case,

and if a jury would find that the work was unremovable, VARA would not protect it. However, any unremovable work at 5Pointz would be protected by VARA because Wolkoff failed to obtain a written waiver.

crafted provisions of § 113(d) based on the removability of the works, not their permanence.¹³

Also supporting the conclusion that VARA applies to temporary works is 17 U.S.C. § 106A(c)(1), which provides that modifications that are “the result of the passage of time or the inherent nature of the materials” are not violations of VARA. This exception was applied in *Flack v. Friends of Queen Catherine Inc.*, 139 F. Supp. 2d 526 (S.D.N.Y. 2001), where the court dismissed a VARA claim because the head of a statue was exposed to the elements, causing the clay to deteriorate, but there was no evidence that the defendant otherwise directly damaged the work. 139 F. Supp. 2d at 534-35. The exception is not applicable here. The whitewashing was not caused by the “passage of time” or the “inherent nature of the materials”; it was caused by Wolkoff throwing paint on the works.

Thus, Congress chose to exclude protection for the passage of time and natural deterioration but not for other types of temporary works. Under the principle of statutory interpretation *expressio unius est exclusio alterius*

(the expression of one thing implies the exclusion of others), this choice lends support to the conclusion that there is no categorical exception for temporary works.

Moreover, the First Circuit has held that VARA protects unfinished works. *Mass. Museum of Contemporary Art Found., Inc. v. Buchel*, 593 F.3d 38, 65 (1st Cir. 2010). An unfinished work is inherently in a temporary state since the ultimate goal is always to finish the work; thus, VARA protects the interim, unfinished work even though it is only temporarily in that form.¹⁴

Analogy to traditional copyright law is also relevant. Under the Copyright Act —of which VARA is a part—a work is “‘created’ when it is fixed in a copy or phonorecord for the first time[.]” 17 U.S.C. § 101. And a work is “‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is *sufficiently permanent or stable to permit it to be perceived . . . for a period of more than transitory duration.*” *Id.* (emphasis added).

For copyright protection, therefore, fixation for even a short period will suffice.

¹³ Damages under VARA could, of course, vary depending on whether the works were permanent or temporary.

¹⁴ Contrast *Pollara v. Seymour*, 344 F.3d 265 (2d Cir. 2003), which held that a poster created for a one-time event was not protected by

VARA because it was advertising material, an express exception. Notably, the Court declined to adopt the district court’s alternative reasoning, which would have held the work was not of recognized stature because it was made for a one-time event.

Thus, in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), the Second Circuit held that copies of television programs were not capable of being perceived “for a period of more than transitory duration” when they existed in the defendant’s data buffers for only 1.2 seconds. 536 F.3d at 129. However, the court suggested that a work would exist for “more than transitory duration” if it was embodied in the data buffers for “at least several minutes.” *Id.* at 128. With no indication to the contrary, it is reasonable to assume that Congress intended to apply the same minimal fixation requirement to works of visual art under VARA. *Cf. Buchel*, 593 F.3d at 51 (applying § 101’s fixation requirement to conclude that unfinished works are protected under VARA).

In sum, § 113(d) contemplates temporary works, § 106A(c) excludes only a narrow category of temporary works unrelated to this case, and analogous case law is consistent with the conclusion that temporary works are protected under VARA.¹⁵

B. Works of Recognized Stature

As the Court stated in *Cohen I*, the district court’s decision in *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303

(S.D.N.Y. 1994) (“*Carter I*”), *aff’d in part, vacated in part, rev’d in part*, 71 F.3d 77 (2d Cir. 1995) (“*Carter II*”) remains the seminal case interpreting the phrase “recognized stature”—which is not defined in VARA—to require “a two-tiered showing: (1) that the visual art in question has ‘stature,’ i.e. is viewed as meritorious, and (2) that this stature is ‘recognized’ by art experts, other members of the artistic community, or by some cross-section of society.” 861 F. Supp. at 325.

The Second Circuit on appeal never had occasion to address the correctness of this formulation since, in reversing, it held that the work did not qualify for VARA protection because it was made for hire. *Carter II*, 71 F.3d at 85-89. But one circuit court did thereafter embrace and apply the district court’s standard for evaluating whether a work of visual art is of “recognized stature.”

As explained in *Cohen I*, the Seventh Circuit in *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999), noted that the *Carter I* test “may be more rigorous than Congress intended,” *id.* at 612, but nonetheless affirmed the district court’s grant of summary judgment and its award of

¹⁵ Common sense also supports this conclusion. Who would argue, for example, that if Picasso had painted *Guernica* on the walls of

5Pointz with the building owner’s consent it would not be worthy of VARA protection?

damages for a sculpture that had been destroyed, under the *Carter I* test utilized by the district court. In doing so, it noted that “plaintiff offered no evidence of experts or others by deposition, affidavit or interrogatories,” but nonetheless established the work’s recognized stature via “certain newspaper and magazine articles, and various letters, including a letter from an art gallery director and a letter to the editor of *The Indianapolis News*, all in support of the sculpture.” *Id.*

The circuit court’s decision in *Martin* appropriately recognizes, therefore, that expert testimony is not the *sine qua non* for establishing that a work of visual art is of recognized stature, and indeed the district court in *Carter I* cautioned that plaintiffs need “not inevitably . . . call expert witnesses to testify before the trier of fact.” 861 F.Supp. at 325. This is in keeping with Congress’s expansive recognition of the moral rights of attribution and integrity of the visual artist and the consequent need to create “a climate of artistic worth and honor that encourages the author in the arduous act of creation.” *Carter II*, 71 F.3d at 83 (quoting H.R. Rep. No. 101-514, at 5). As the Second Circuit noted in *Carter II*, therefore, the courts “should use common sense and generally accepted standards of the

artistic community in determining whether a particular work” is a work of visual art since “[a]rtists may work in a variety of media, and use any number of materials in creating their works.” *Id.*

The same common sense should be utilized in assessing whether the visual work is of recognized stature since “[b]y setting the standard too high, courts risk the destruction of the unrecognized masterwork; by setting it too low, courts risk alienating those . . . whose legitimate property interests are curtailed.” Christopher J. Robinson, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 Fordham L. Rev 1935, 1968 (2000). Thus, as one court has held, even inferred recognition from a successful career can be considered in determining whether a visual artist’s work has achieved recognized stature. See *Lubner v. City of Los Angeles*, 45 Cal. App. 4th 525, 531 (1996).

In the present case, the Court need not dwell on the nuances of the appropriate evidentiary standard since the plaintiffs adduced such a plethora of exhibits and credible testimony, including the testimony of a highly regarded expert, that even under the most restrictive of evidentiary standards almost all of the plaintiffs’ works easily qualify as works of recognized stature.

To begin, that Jonathan Cohen selected the handful of works from the thousands at 5Pointz for permanence and prominence on long-standing walls is powerful, and arguably singular, testament to their recognized stature. They were walls that spanned multiple stories, walls visible to millions on the passing trains; walls near the entrances. Many of these works had survived for years. As 5Pointz's curator, Cohen considered them outstanding examples of the aerosol craft. And as Wolkoff himself acknowledged, Cohen was qualified to assess the artistic merits of the works since "he had good taste in the artists that came there." Tr. at 2086:17. They were 5Pointz's jewels.

Wolkoff's faith in Cohen was not unwarranted. The multitude of artists painting on the walls marched to Cohen's beat. He called the shots and had the respect of his artistic community. That it was he who chose the works that are worthy of VARA protection in this litigation speaks volumes to their recognized stature.

But there is so much more. All of the plaintiffs had also achieved artistic recognition outside of 5Pointz. And in their Folios they collectively presented over a thousand exhibits in support of their claims that their works at 5Pointz had achieved recognized stature. The

Folios covered the highlights of their careers, as well as evidence of the placement of their works at 5Pointz in films, television, newspaper articles, blogs, and online videos, in addition to social media buzz.

And plaintiffs' highly qualified expert, Vara, provided detailed findings as to the skill and craftsmanship of each of the 49 works, the importance of 5Pointz as a mecca for aerosol art, the academic and professional interest of the art world in the works, and her professional opinion that they were all of recognized stature. The Court finds Vara highly credible and affords great weight to her testimony, although, as explained *infra*, it finds that four of the 49 works do not qualify as having achieved recognized stature.

Defendants' expert Thompson's testimony had two fatal flaws: First, she used an unduly restrictive interpretation of recognized stature that was more akin to a masterpiece standard. Second, she relied heavily on her inability to find the works on social media or in academic databases; but, as effectively drawn out by plaintiffs' counsel on cross-examination, her search methodology was unduly restrictive and almost designed to avoid finding results. Tellingly, her searches did not even uncover many of plaintiffs' social media

exhibits, demonstrating the weakness of her approach. Her final conclusion that none of the works had achieved recognized stature defies credibility. If not a single one of these works meet the recognized stature standard, it is hard to imagine works that would, short of a Caravaggio or Rembrandt.

1. Recognized Stature of Individual Artworks

The Court now turns to making the requisite individualized findings as to each of the 49 works:

a. The Long-Standing Works

The Court finds that 37 works on long-standing walls all achieved recognized stature by virtue of their selection by Cohen for these highly coveted spaces, as reinforced by the supportive evidence in the plaintiffs' Folios and Vara's compelling expert testimony as to their artistic merit and embrace by the artistic community. They are:

- Jonathan Cohen's *Eleanor RIP*, *7-Angle Time Lapse*, *Patience*, *Character*, *Clown with Bulbs*, *Meres Outdoor Wildstyle*, and *Inside Wildstyle*
- Sandra Fabara's *Green Mother Earth* • Luis Lamboy's *Blue Jay Wall*, *Inside 4th Floor*, *World Traveler*, *Logo for Clothing Brand aka Monopoly Man*, and *Electric Fish*
- Esteban Del Valle's *Beauty and the Beast*
- Christian Cortes's *Skulls Cluster*, *Jackson Avenue Skulls*, *Up High Blue Skulls*, and *Up High Orange Skulls*
- Carlos Game's *Geisha*, *Marilyn*, *Red*, *Denim Girl*, and *Black and White 5Pointz Girl*
- James Rocco's *Bull Face*, *Lord Paz*, and *Face on Jackson*
- Steven Lew's *Crazy Monsters*
- Nicholai Khan's *Dos Equis Man*
- James Cochran's *Subway Rider*
- Luis Gomez's *Inside King Kong*
- Richard Miller's *Monster I*
- Jonathan Cohen and Maria Castillo's *Love Girl and Burner*
- Jonathan Cohen and Akiko Miyakami's *Underwater Fantasy*
- William Tramontozzi, Jr. and James Rocco's *Jimi Hendrix Tribute*
- Akiko Miyakami and Carlos Game's *Japanese Fantasy*
- Bienbenido Guerra and Carlo Nieva's *Return of New York*
- Jonathan Cohen, Luis Lamboy, and Thomas Lucero's *Angry Orchard*

b. Other Works

Ten works on the walls were of recent origin; two were not on walls at all. For these 12 works, the Court

“adopt[s] in whole” the jurors’ findings. *Ragin*, 6 F.3d at 907. As representatives of the community and a “cross-section of society,” *Carter*, 861 F.Supp. at 325, their input as an advisory jury was of value to the Court, “particularly . . . in cases [such as this one] involving community-based standards.”

NAACP v. Acusport Corp., 226 F. Supp. 2d at 398.

The jury found recognized stature for Rodrigo Henter de Rezende’s *Fighting Tree*, Thomas Lucero’s *Black Creature*, Akiko Miyakami’s *Manga Koi*, Francisco Fernandez’s *Dream of Oil*, Nicholai Khan’s *Orange Clockwork*, Kenji Takabayashi’s *Starry Night*, Richard Miller’s *Monster II*, and Jonathan Cohen and Akiko Miyakami’s *Save 5Pointz*. These eight works garnered third party attention, social media presence, and/or promises from Cohen that they would be long-standing.

The jury did not find recognized stature for Jonathan Cohen’s *Drunken Bulbs*, Akiko Miyakami’s *Japanese Irish Girl*, Carlos Game’s *Faces on Hut*, and Jonathan Cohen and Rodrigo Henter de Rezende’s *Halloween Pumpkins*.

Drunken Bulbs and *Japanese Irish Girl* were gifts to the Shannon Pot Bar.¹⁶ They were not part of the curated

5Pointz collection. Furthermore, neither attracted significant third-party attention or social media buzz during their short life spans.

Faces on Hut was not on a 5Pointz wall; it was on a tin shack near the loading dock. As its creator, Carlos Game testified: “[N]obody wanted to paint on it because it was a tin shack, you know, and it was rusted out” Tr. at 794:12-13. Game also did not adduce any social media coverage or commentary regarding the work.

Halloween Pumpkins was created in very late October 2013, less than a month before the whitewash, and did not achieve any third party recognition. Moreover, because it was Halloween-themed, it was unlikely to have survived the holiday season.

In sum, the Court finds 45 of the 49 works achieved recognized stature. *Drunken Bulbs*, *Japanese Irish Girl*, *Faces on Hut*, and *Halloween Pumpkins* did not.

C. Mutilation and Prejudice to Honor or Reputation

As noted, even if a work is not of “recognized stature,” VARA also protects works from “intentional distortion, mutilation, or other modification . . . [that] would be prejudicial to [the artist’s]

¹⁶ Though unclear from the testimony of Miyakami and Cohen, this bar appears to have been on the 5Pointz site.

honor or reputation.” 17 U.S.C. § 106A(a)(3)(A). “[I]n determining whether ‘intentional distortion, mutilation, or modification’ of [a] Work would be ‘prejudicial to [plaintiffs’] honor or reputation,’ [a court should] consider whether such alteration would cause injury or damage to plaintiffs’ good name, public esteem, or reputation in the artistic community.” *Carter I*, 861 F. Supp. at 323.

This concept is inherently murky. *Carter I* held that an artist’s honor or reputation may be harmed if the artwork “present[ed] to viewers an artistic vision materially different from that intended by [the artist].” *Id.* In *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Buchel*, 593 F.3d 38 (1st Cir. 2010), the circuit court held that changes made to an unfinished art installation by a museum against the artist’s wishes were sufficient to raise a question of fact as to whether the artist’s honor or reputation were injured. The court focused on evidence that newspapers covering the exhibit after the changes had a negative opinion of the altered work.

Here, the question is academic in respect to the 45 works of recognized stature since the Court is not awarding any actual damages, as explained *infra*, and only one statutory damages award

may be awarded per artwork “for all infringements involved in the action.” 17 U.S.C. § 504(c)(1). Thus, whether defendants are additionally liable under this second prong is not of any practical consequence.

Of the remaining four, *Japanese Irish Girl* was destroyed and therefore not “distorted, mutilated, or otherwise modified.” *Faces on Hut* was not destroyed until the demolition of the building and apparently survived the whitewash. Therefore, it too was not “distorted, mutilated, or otherwise modified.”

Drunken Bulbs was only partially whitewashed; the outlines of the bulbs are dimly visible underneath the white paint. However, these vague outlines are unrecognizable as Cohen’s original work. Nobody looking at the work would know that it was his. Therefore, the Court holds this distortion did not prejudice his honor or reputation.

Halloween Pumpkins was almost entirely covered in black paint, but Cohen’s “wild style” contribution to the painting was apparently left untouched. However, Cohen testified that he was able to recover this portion of the work, and once the piece was removed, the final result was a black wall; the original artwork was not visible at all under the black paint, except for one purple cloud

at the top of the wall, a minor detail in the painting. Therefore, the Court holds this distortion also did not prejudice the artists' honor or reputation.

Having determined that the defendants have violated plaintiffs' rights by intentionally destroying their works of "recognized stature," the Court now turns to damages.

V

A. Actual Damages

As for actual damages,¹⁷ the parties presented dueling experts as to the valuation of the destroyed works. Plaintiffs' expert, Elizabeth Littlejohn, testified that the works were worth from \$50,000 to \$80,000 per artwork. She arrived at this number through a complicated formula that began with the sale price of a Banksy¹⁸ piece and awarded each artwork a percentage of that value based on the artist's reputation, the merit of the work, and other factors.

The Court finds this methodology flawed. First, it does not account for the

removal costs of the works, which plaintiffs' own removal expert, Alden, testified could run in the hundreds of thousands of dollars. Second, there is no evidence that these artists have ever achieved a fraction of Banksy's sales history; most testified that they had never sold a work for more than a few thousand dollars. Third, Littlejohn's method did not account for the unique problems in selling artwork that is the size of a wall of a building.

The Court finds defendants' appraisal expert, Christopher Gaillard, credible. Gaillard testified that because of the unique challenges and costs of selling those artworks at 5Pointz which were the size of a building wall, they did not have a provable market value. The Court agrees and holds that plaintiffs failed to establish a reliable market value for their works.

Therefore, the Court does not award actual damages.¹⁹

B. Statutory Damages

gain realized by Wolkoff and his companies is best addressed in calculating an award under the statutory damages factors, *see infra*.

¹⁸ Banksy is widely considered the world's most prominent aerosol artist.

¹⁹ Plaintiffs contend that they are entitled to damages for emotional distress. Under traditional copyright law, plaintiffs cannot recover such damages. *See Garcia v. Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015) ("[A]uthors cannot seek emotional damages under the Copyright Act, because such damages are unrelated to the value and marketability of their works."); *Kelley v. Universal Music Group*, 2016 WL 5720766, at *2 (S.D.N.Y. Sept. 29, 2016)

¹⁷ In addition to actual damages, 17 U.S.C. § 504(a)(1) awards "any additional profits of the infringer" to the winning plaintiff. However, while the plaintiffs established that Wolkoff profited indirectly from the destruction of their artwork by building a profitable luxury condominium, they provided no evidence to establish the precise amount of these profits. Nor have plaintiffs suggested a fair way to apportion the luxury condominium's profits between those caused by the legal development of the site as a business venture and the illegal destruction of the artwork to clear the site for construction. Therefore, the Court finds the plaintiffs have not met their burden to establish a basis to award profits. The

The Copyright Act affords the trial court “wide discretion . . . in setting the amount of statutory damages.” *Fitzgerald Pub. Co., Inc. v. Baylor Pub. Co., Inc.*, 807 F.2d 1110, 1116 (2d Cir. 1986). Statutory damages are “not fixed or readily calculable from a fixed formula.” *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352-53 (1998) (citation omitted). “Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.” *F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 233 (1952). There need not be a correlation between statutory damages and actual damages. *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 127 (2d Cir. 2014). “To suggest otherwise is to ignore the various other factors a court may consider and the purposes of statutory damages in the willful infringement context.” *Id.* “Statutory damages exist in part because of the difficulties in proving—and providing compensation for—actual harm in copyright infringement actions.” *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 460 (D. Md. 2004).

As such, statutory damages are particularly appropriate “when no actual damages are proven or they are difficult to calculate.” *Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1126 (2d Cir. 1989). They are “not meant to be merely compensatory or restitutionary. The statutory award is also meant ‘to discourage wrongful conduct.’” *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 113 (2d Cir. 2001) (rejecting defendant’s argument that statutory damages award should be overturned because it “bears little relationship” to actual damages) (citation omitted).

As previously explained, the factfinder may award between \$750 and \$30,000 per work, unless the infringement was committed willfully; if so, the award may be as high as \$150,000 per work. Review of a statutory damages award made after a finding of willfulness “is even more deferential than abuse of discretion.” *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., Inc.*, 74 F.3d 488, 496 (4th Cir. 1996) (citing *Douglas v. Cunningham*, 294 U.S. 207, 210 (1935)). “Within [the statutory] limitations the court’s discretion and sense of justice are controlling . . .” *D.C. Comics Inc. v. Mini Gift Shop,*

(“Because emotional distress damages are not compensable under the Copyright Act, this claim must also be dismissed.”). Since VARA provides damages under “the same standards

that the courts presently use” under traditional copyright law, H.R. Rep. No. 101-514, at 21-22 (1990), emotional damages are not recoverable.

912 F.2d 29, 34 (2d Cir. 1990) (quoting *L.A. Westermann v. Dispatch Printing Co.*, 249 U.S. 100, 106 (1919)).

1. Willfulness

“A copyright holder seeking to prove that a copier’s infringement was willful must show that the infringer ‘had knowledge that its conduct represented infringement or . . . recklessly disregarded the possibility.’” *Bryant v. Media Right Prods.*, 603 F.3d 135, 143 (2d Cir. 2010) (quoting *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1382 (2d Cir. 1993)). “This knowledge may be ‘actual or constructive.’” *N.A.S. Import, Corp. v. Chenson Enters., Inc.*, 968 F.2d 250, 252 (2d Cir. 1992). “In other words, it need not be proven directly but may be inferred from the defendant’s conduct.” *Id.*

The jury found that in each case Wolkoff acted willfully. The Court could not agree more. Wolkoff knew from the moment the lawsuit was initiated that the artists were pressing their VARA claims. He admitted as much at trial:

Q: And you were aware that the artists were trying to apply under the Visual Artists Rights Act?

A: Yes.

. . .

THE COURT: You heard about VARA at that time?

A: Yes.

THE COURT: You have a generalized view—

A: At that time, yes.

. . .

Q: And you had hired Mr. Ebert’s law firm at the time; correct?

A: Yes.

Q: You had a general counsel—an in-house lawyer advising you on legal matters; correct?

A: Yes.

Tr. at 2016:24-2017:22.

As previously explained, under VARA, Wolkoff could have given the plaintiffs 90 days’ notice to allow them the opportunity to salvage their works. And indeed, plaintiffs’ expert conservator, Alden, convincingly testified that curation techniques had evolved to the point where removal of works of art from the wall of a building was feasible and had been done. As an example, she referenced the Berlin Wall, from which hundreds of works of graffiti on the wall have been preserved and sold, auctioned, or given as gifts, including five works which were successfully transported to New York City. Alden also testified that she had personally successfully removed a mural from a building.

And in respect to the plaintiffs’ works at 5Pointz, Alden explained that many could have been totally or partially removed by the artists, at little

cost, because the works were on “siding or plywood or sheetrock” or they “incorporated doors or windows from the building [which] could have been easily removed,” Tr. at 1971:23- 1972:4; and many others could be removed by a conservator and contractors. See Exhibit 1270 (identifying 12 “Works for Which Artists’ Removal Was Possible”; 9 “Works Which Artists Were Able to Partially Remove,” and 28 “Works Which Could Only Have Been Removed by Conservator and Contractors”).²⁰

But Wolkoff could care less. As he callously testified:

I decided—I alone decided to hire people to whitewash[] it in one shot instead of *waiting for three months* and then going to do something irrational again and getting arrested. I will go and end it and whitewash it. I decided to do that. It was pretty much a spur-of-the-moment thing.

Tr. at 2059:1-6 (emphasis added).

Wolkoff’s reference to the artists doing “something irrational again and getting arrested” is fanciful and unfounded. Plainly, the evidence does not support the notion that he cared much

for what was best for the artists. After the whitewash, he refused to let them onto his property to recover what had survived and even attempted to have them arrested when they tried to do so.

And his claim that he was worried that the plaintiffs may do something reckless and illegal is also belied by the evidence. The plaintiffs operated within the law in attempting to protect their works: They sought legal advice, filed a claim with the Landmark Preservation Commission, sought to generate public pressure to preserve the site, raised money, and filed this lawsuit. Wolkoff’s only justification for his concern that the plaintiffs may attempt to break the law to preserve their work is that he heard nonspecific “rumblings.” *Id.* at 2042:5. But he could not identify any particular source of the rumblings, nor had he ever personally had a problem with the artists:

Q: So this information that you received that the artists could be emotional is from someone you cannot identify; correct?

A: Yes.

Q: The artists were never violent; correct?

A: Correct.

²⁰ It would logically seem that if Wolkoff did give the 90 days’ notice and none of the works were removed by the artists, he would have the burden of proving which works were removable in order to avoid liability for their destruction. If that

were to have happened, Alden would have been a good witness for him. However, since the notice was not given, Wolkoff was liable under VARA for the destruction of all the works of recognized stature.

Q: They always followed the law when then were on your property; correct?

A: Yes.

Q: You have never had any problems with the artists; right?

A: Absolutely correct.

Tr. at 2047:13-23.

As Cohen confirmed: “I followed the rules from day one. I went by my lawyer and he did not.” *Id.* at 1464:2-3.

Wolkoff’s recalcitrant behavior was consistent with the manner by which he testified in court. He was bent on doing it his way, and just as he ignored the artists’ rights he also ignored the many efforts the Court painstakingly made to try to have him responsively answer the questions posed to him.

From his testimony, the only logical inference that the Court could draw from Wolkoff’s precipitous conduct as soon as the Court denied the artists’ preliminary injunction application was that it was an act of pure pique and revenge for the nerve of the plaintiffs to sue to attempt to prevent the

destruction of their art. This was the epitome of willfulness.²¹

It remains for the Court to fix the amount of statutory damages.

2. The Statutory Factors

“When determining the amount of statutory damages to award for copyright infringement, courts consider: (1) the infringer’s state of mind; (2) the expenses saved, and profits earned, by the infringer; (3) the revenue lost by the copyright holder; (4) the deterrent effect on the infringer and third parties; (5) the infringer’s cooperation in providing evidence concerning the value of the infringing material; and (6) the conduct and attitude of the parties.” *Bryant*, 603 F.3d at 144.²²

Wolkoff rings the bell on each relevant factor.

a. The Infringer’s State of Mind

Because Wolkoff acted willfully in destroying the works of art, this factor weighs in favor of a high statutory damages award. As noted, Wolkoff’s two alleged justifications for the whitewash—that it would be better for the plaintiffs to

²¹ It may also well be that Wolkoff wanted to strike “while the iron was hot” and was willing to run the risk of being held liable for substantial statutory damages rather than to jeopardize his multimillion dollar luxury condo project. Indeed, with a fully developed record, permanent injunctive relief might have been available under the literal reading of VARA. Such behavior would be equally willful.

²² The fifth factor does not fit this case. It is designed for traditional copyright cases where a defendant is liable for selling infringing material

and the plaintiff’s damages proof requires evidence of defendant’s sales that can only be provided by defendant. See *Curet-Velazquez v. ACEMLA de Puerto Rico, Inc.*, 656 F.3d 47, 59 (1st Cir. 2011) (upholding maximum statutory damages award because defendants “did not provide comprehensive and accurate [accounting] reports” showing how they profited by selling plaintiff’s work). Here, defendants destroyed, rather than sold, plaintiffs’ works, so this factor is inapplicable, and the Court will not consider it.

lose their works quickly, and that he was concerned the plaintiffs might do something reckless and illegal in an attempt to save the works—are implausible.

The whitewash did not end the conflict in one go; the effects lingered for almost a year. The sloppy, half-hearted nature of the whitewashing left the works easily visible under thin layers of cheap, white paint, reminding the plaintiffs on a daily basis what had happened. The mutilated works were visible by millions of people on the passing 7 train. One plaintiff, Miyakami, said that upon seeing her characters mutilated in that manner, it “felt like [she] was raped.” Tr. at 1306:24-25. It is simply untenable that a rational person could view the whitewashing as being in the best interest of the artists. **b. The Expenses Saved, and Profits Earned, by the Infringer**

This factor is not a clean fit for VARA since, unlike a traditional copyright infringement case, Wolkoff did not sell the plaintiffs’ art; hence, there were no direct profits. However, he indirectly profited when the value of the site increased from \$40 million to \$200 million as soon as the variance was obtained. Destroying 5Pointz allowed Wolkoff to realize this gain. He also charged licensing fees to film at the site that

netted him hundreds of thousands of dollars. Because Wolkoff realized significant profits by violating VARA, this factor cuts in favor of a high statutory damages award.

c. Revenue Lost by the Copyright Holder

While the plaintiffs were never able to place a dollar figure on how the whitewash of 5Pointz impacted their careers, it often had a negative effect. As plaintiff Takabayashi testified: “I would actually have clients . . . come by and observe the work to get an idea of what they would be getting if I was going to execute a mural on their property There were possibilities—there was business that I probably lost because of the fact that the artwork was eliminated.” Tr. at 315:23-316:4. And plaintiff Del Valle testified: “It definitely took away a lot of opportunities that I would have had. I was consistently getting contacted about opportunities . . . all coming from me building my career from [5Pointz].” *Id.* at 131:15-22.

Furthermore, as Cohen testified, the salvageable artwork at 5Pointz “could have adorned a museum, a full wing of a museum. . . . I don’t think you guys really get a full idea of the picture of this building and its property It was eight stories tall. We could have

filled a wing, if not more, of a museum.”
Id. at 1466:18-23.

The value of 5Pointz to the artists’ careers was significant, and its loss, though difficult to quantify, precluded future opportunities and acclaim. Therefore, this factor also supports a significant statutory damages award.

d. The Deterrent Effect on the Infringer and Third Parties

This is perhaps the most important factor in this case. Without a significant statutory damages award, the preservative goals of VARA cannot be met. If potential infringers believe that they can violate VARA at will and escape liability because plaintiffs are not able to provide a reliable financial valuation for their works, VARA will have no teeth. It will simply be cost-effective for infringers to violate the statute. This would not further its preservative goals.

Wolkoff has been singularly unrepentant. He was given multiple opportunities to admit the whitewashing was a mistake, show remorse, or suggest he would do things differently if he had another chance. He denied them all:

Q: Let me ask you a hypothetical question. Let’s go back in time.

A: Yes.

Q: Would you have done it again?

A: Yes.

Tr. 2052:25-2053:4.

A: But that was the decision I made. I would make the same decision today if that happened today.

Id. at 2056:2-3.

Thus, Wolkoff remains undeterred, and unrepentant that his thoughtless act violated the law and had a devastating impact on people he claims he was trying to help. This factor could not cut more strongly in favor of a high statutory damages award.

e. The Conduct and Attitude of the Parties

The Court has discussed at length the problematic conduct of Wolkoff during the whitewashing and on the witness stand. Needless to say, he has not helped his case. On the other hand, the plaintiffs have conducted themselves with dignity, maturity, respect, and at all times within the law. Therefore, this factor also cuts heavily in favor of a high statutory damages award.

3. The Statutory Damages Award

Collectively, all five relevant factors support the maximum award of statutory damages. Therefore, the Court awards \$150,000 for each of the 45 works, for a total statutory damages award of \$6,750,000.

If not for Wolkoff's insolence, these damages would not have been assessed. If he did not destroy 5Pointz until he received his permits and demolished it 10 months later, the Court would not have found that he had acted willfully. Given the degree of difficulty in proving actual damages, a modest amount of statutory damages would probably have been more in order.²³

The shame of it all is that since 5Pointz was a prominent tourist attraction the public would undoubtedly have thronged to say its goodbyes during those 10 months and gaze at the formidable works of aerosol art for the last time. It would have been a wonderful tribute for the artists that they richly deserved.

CONCLUSION

Judgment will be entered for each individual plaintiff in the following amounts:²⁴

Artist	Total Award
Jonathan Cohen	\$1,325,000.00
Sandra Fabara	\$150,000.00
Luis Lamboy	\$800,000.00

²³ Of course, all this could have been easily avoided with a written waiver of the artists' VARA rights up front, as § 113(d) expressly contemplates.

²⁴ While § 504(c)(1) requires the plaintiffs to elect statutory damages in lieu of actual

Estaban Del Valle	\$150,000.00
Rodrigo Henter de Rezende	\$150,000.00
Thomas Lucero	\$200,000.00
Akiko Miyakami	\$375,000.00
Christian Cortes	\$600,000.00
Carlos Game	\$825,000.00
James Rocco	\$525,000.00
Steven Lew	\$150,000.00
Francisco Fernandez	\$150,000.00
Nicholai Khan	\$300,000.00
James Cochran	\$150,000.00
Luis Gomez	\$150,000.00
Richard Miller	\$300,000.00
Kenji Takabayashi	\$150,000.00
Maria Castillo	\$75,000.00
William Tramonuzzi	\$75,000.00
Carlo Nieva	\$75,000.00
Bienbenido Guerra	\$75,000.00
Total	\$6,750,000.00

SO ORDERED

/S/Frederic Block
 FREDERIC BLOCK

damages "before final judgment is rendered," the Court will deem that the plaintiffs have chosen to accept these statutory damages rather than no damages at all.

Senior United States District Judge

Brooklyn, New York
February 12, 2018

APPENDIX



Akiko Miyakami – Japanese Irish Girl
A-1



Akiko Miyakami – *Manga Koi*
A-2



Akiko Miyakami and Carlos Game – *Japanes Fantasy*
A-3



Akiko Miyakami and Jonathan Cohen – *Save 5Pointz*
A-4



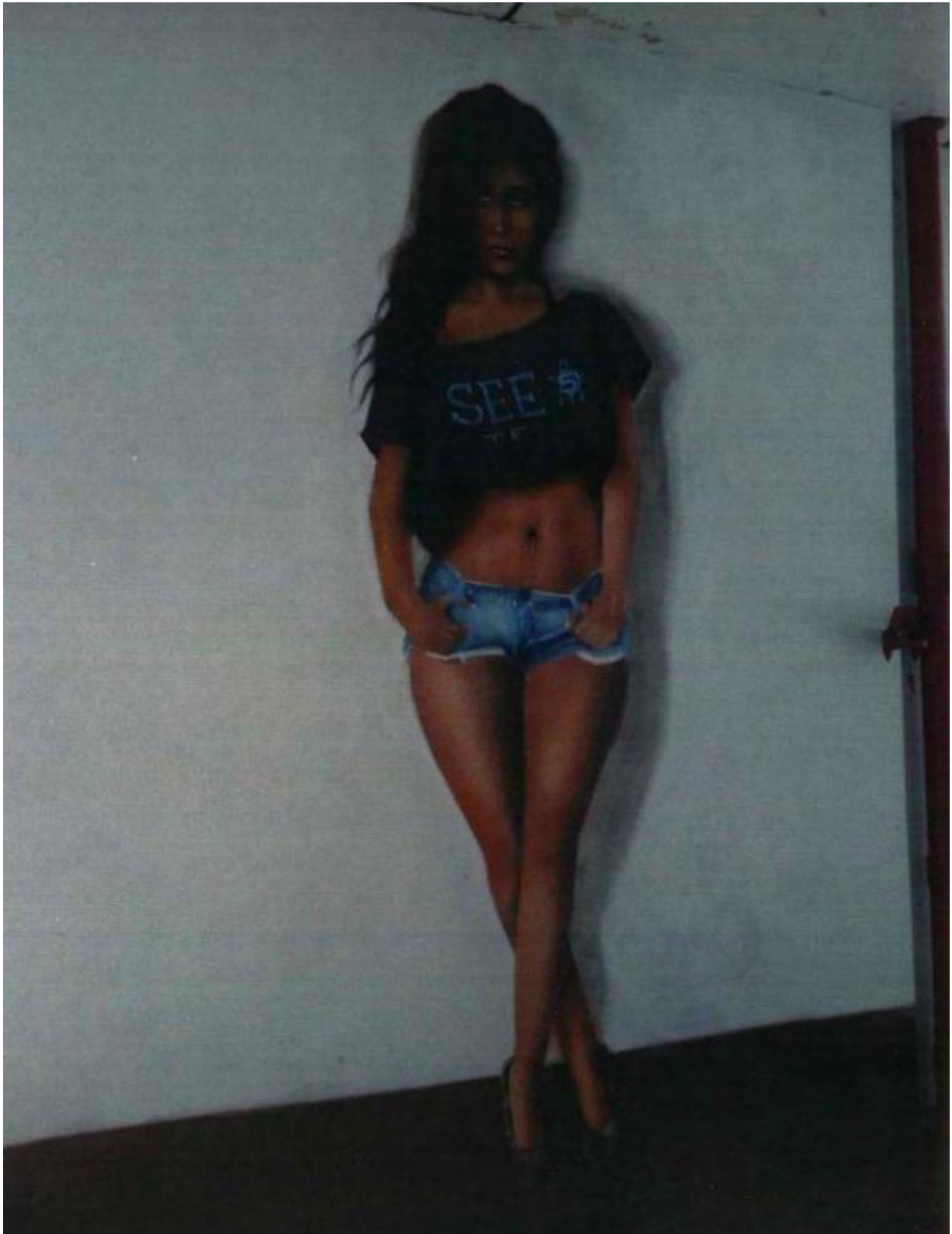
Akiko Miyakami and Jonathan Cohen – *Underwater Fantasy*
A-5



Bienbenido Guerra and Carlo Nieve – *Return of New York*
A-6



Carlos Game – Black and White 5Pointz Girl
A-7



Carlos Game – *Denim Girl*
A-8



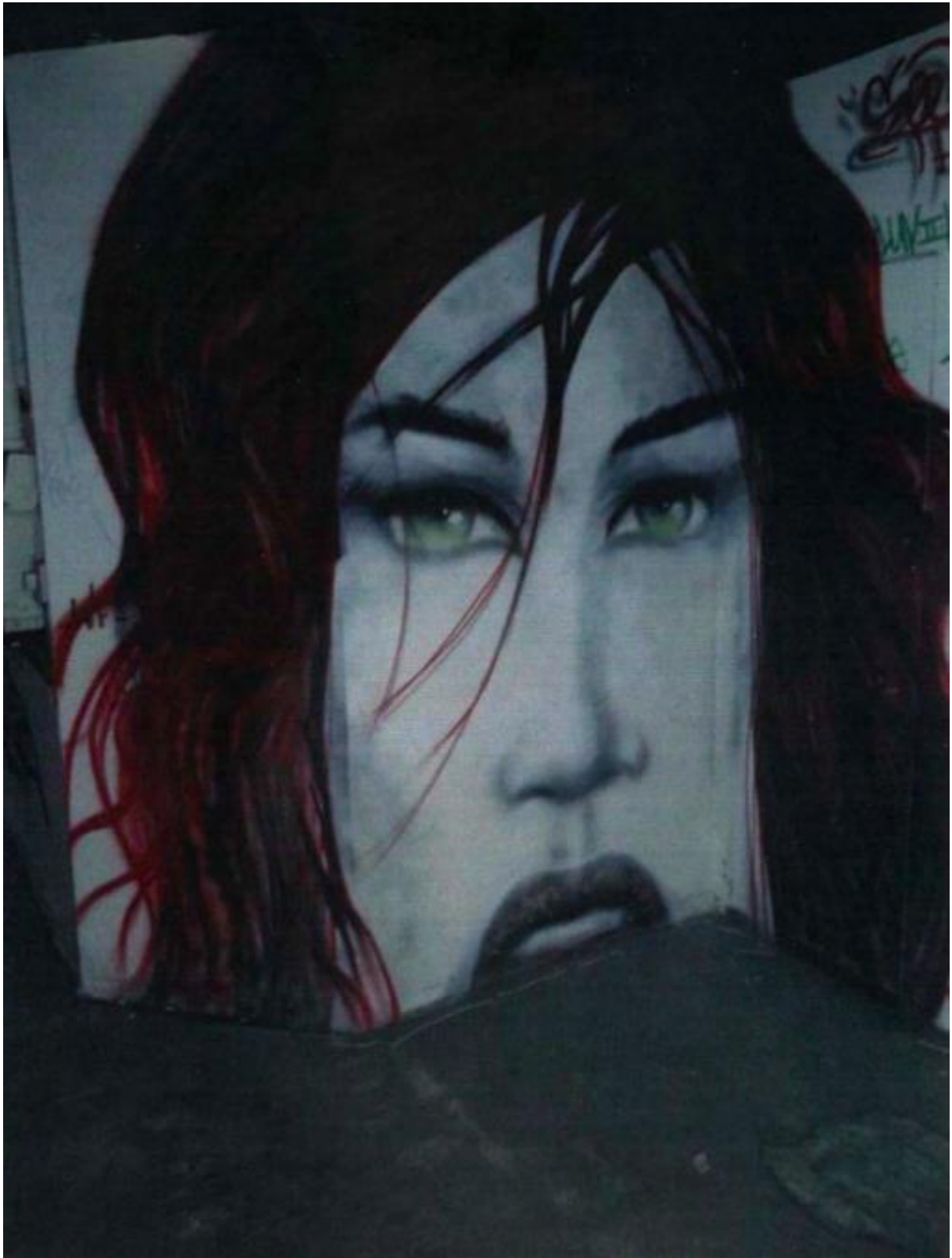
Carlos Game – Faces on Hut
A-9



Carlos Game – *Geisha*
A-10



Carlos Game – Marilyn
A-11



Carlos Game – *Red*
A-12



Christian Cortes – Jackson Avenue Skulls
A-13



Christian Cortes – *Skulls Cluster*
A-14



Christian Cortes – Up High Orange Skulls
A-15



Christian Cortes – *Up High Skulls*
A-16



Esteban Del Valle – Beauty and the Beast
A-17



Francisco Fernandez – *Dream of Oil*
A-18



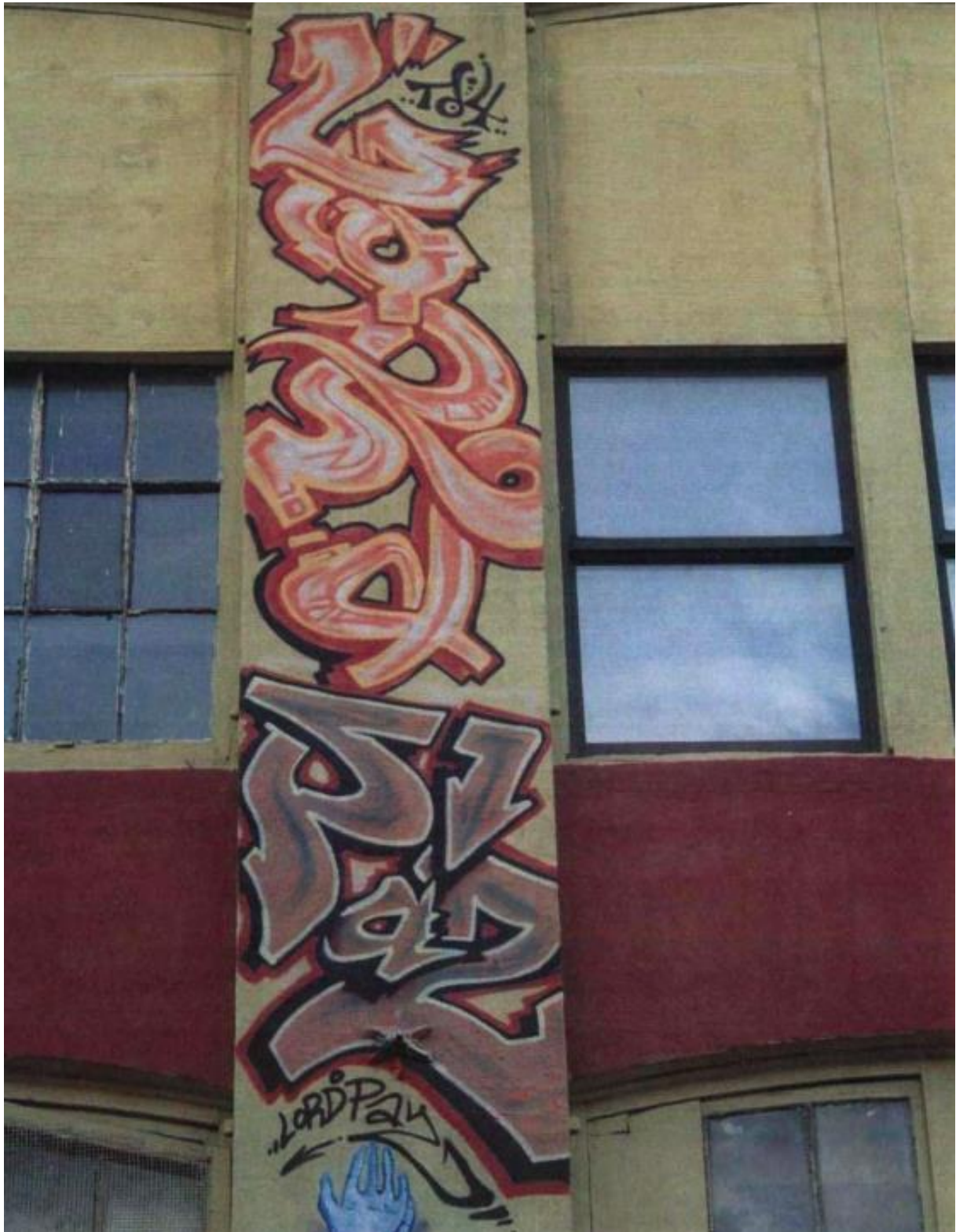
James Cochran – *Subway Rider*
A-19



James Rocco – *Bull Face*
A-20



James Rocco – Face on Jackson
A-21



James Rocco – Lord Paz
A-22



Jonathan Cohen – 7-Angle Illusion
A-23



Jonathan Cohen – *Character*
A-24



Jonathan Cohen – Clown with Bulbs
A-25



Jonathan Cohen – *Drunken Bulbs*
A-26



Jonathan Cohen – *Eleanor RIP*
A-27



Jonathan Cohen – Inside Wildstyle
A-28



Jonathan Cohen – Outdoor Wildstyle
A-29



Jonathan Cohen – *Patience*
A-30



Jonathan Cohen and Maria Castillo – *Burner and Love Girl*
A-31



Jonathan Cohen and Rodrigo Henter de Rezende – *Halloween Pumpkins*
A-32



Jonathan Cohen, Luis Lamboy, and Thomas Lucero – *Angry Orchard*
A-33



Kenji Takabayashi – *Starry Night*
A-34



Luis Gomez – Inside King Kong
A-35



Luis Lamboy – Blue Jay Wall
A-36



Luis Lamboy – Electric Fish
A-37



Luis Lamboy – Inside 4th Floor
A-38



Luis Lamboy – Clothing Brand aka Monopoly Man
A-39



Luis Lamboy – World Traveler
A-40



Nicholai Khan – Dos Equis Man
A-41



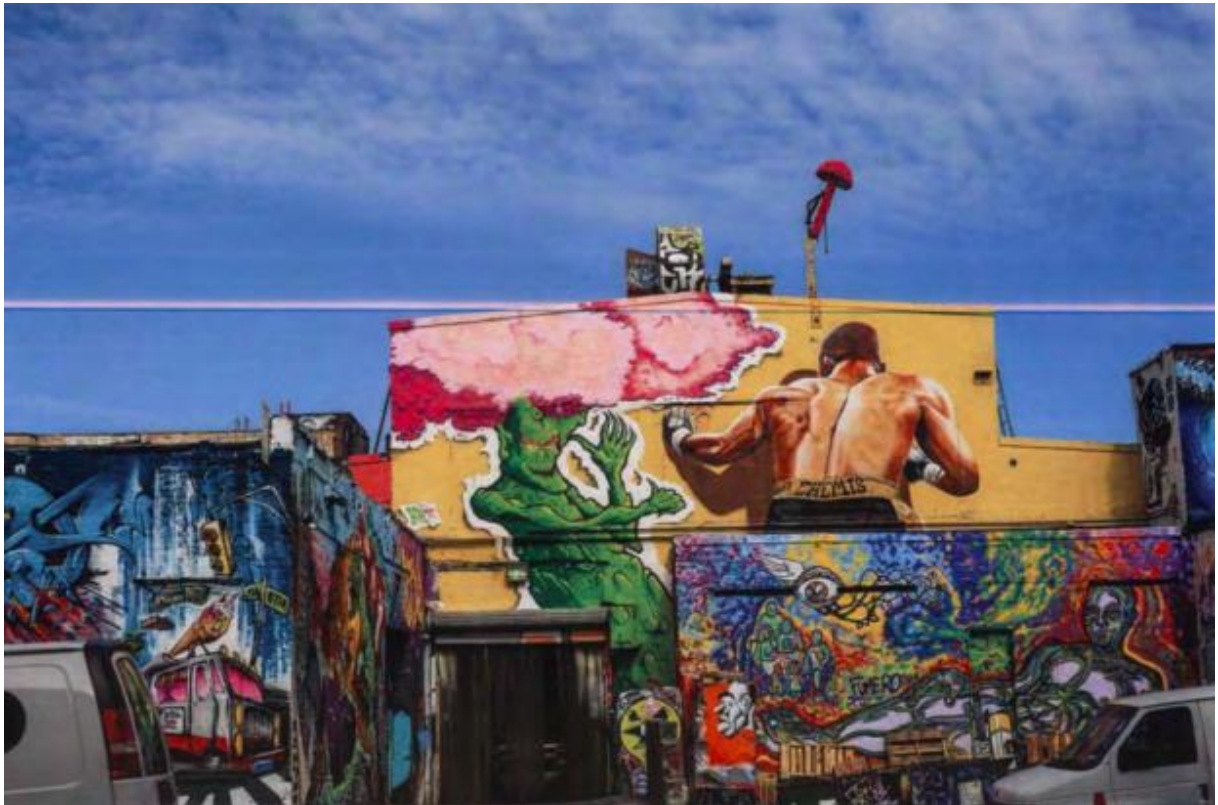
Nicholai Khan – Orange Clockwork
A-42



Richard Miller – *Monsters I*
A-43



Richard Müller – *Monsters II*
A-44



Rodrigo Henter de Rezende – *Fighting Tree*
A-45



Sandra Fabara – Green Mother Earth
A-46



Steven Lew – Crazy Monsters
A-47



Thomas Lucero – Black Creature
A-48



William Tramontozzi and James Rocco – *Jimi Hendrix Tribute*
A -49

Goldman v. Breitbart News Network LLC, USDC, S.D. New York, February 15, 2018 – IST EMBEDDING VON URHEBERRECHTLICH GESCHÜTZTEM MATERIAL EINE URHEBERRECHTSVERLETZUNG?

Urteilsanmerkung von Weronika Hyjek¹

Das US-Bezirksgericht für den südlichen Bezirk von New York entschied, dass Websites, die einen Tweet mit einem urheberrechtlich geschützten Bild anzeigen, das Urheberrecht an dem Bild (genauer: das Recht der öffentlichen Zugänglichmachung, eng. the right of public display) verletzen. Folglich lehnte das Gericht den "Server-Test" des „Ninth Circuit“ im Fall *Perfect 10* ab², der besagt, dass ein Inhaltsanbieter einen Verstoß gegen das Urheberrecht nur begeht, wenn er das urheberrechtlich geschützte Material auf seinem Server hostet. Wenn aber der Beklagte mit anderen technischen Mitteln ein Foto zeigt, ohne dieses zu hosten, handelt es sich nicht um eine öffentliche Zugänglichmachung und somit nicht um eine Urheberrechtsverletzung.

Der Sachverhalt des vorliegenden Falls war folgender. Am 2. Juli 2016 „snappte“ der Kläger (Fotograf Justin Goldman) ein Foto von Tom Brady (der

US-amerikanische American-Football-Spieler auf der Position des Quarterbacks) und lud es auf seinem *Snapchat* hoch. Das Foto hat danach verschiedene *social media platforms* passiert, und zwar auch *Twitter*. Der Kläger verklagte *Breitbart*, *Time*, *Vox* und einige andere Medien wegen der Einbettung eines *Tweets*, der sein urheberrechtlich geschütztes geistiges Eigentum, ein Foto von Tom Brady, enthielt. Keine der Websites hat aber das urheberrechtlich geschützte Foto auf ihren eigenen Servern heruntergeladen, kopiert oder gespeichert. Alle genannten Nachrichtensender bzw. Blogs haben das Foto in ihren Artikeln ausschließlich mit dem genannten *Tweet* verlinkt. Somit hat grundsätzlich lediglich der ursprüngliche *Tweeter* das Urheberrecht des Fotografen verletzt. Die Richterin war aber anderer Meinung.

Sie analysierte das Recht der öffentlichen Zugänglichmachung eines Urhebers gemäß dem US-Urheberrechtsgesetz (Section 106(5) of the Copyright Act). Die Schlüsselfrage war, ob das Einbetten von Tweets durch dieses Recht erfasst wird. Gemäß dem Gesetz beinhaltet es die Zugänglichmachung durch jedes Gerät oder jeden Prozess. Der Begriff ist somit weit definiert. Die

¹ Weronika Hyjek ist wissenschaftliche Mitarbeiterin in der Kanzlei Kemle, Heidelberg.

² Der Test wurde im Fall *Perfect 10, Inc. gegen Amazon.com, Inc.*, 508 F.3d 1146 (9. Cir. 2007) ausgeführt.

Beklagten unternahmen aktive Schritte um das Bild öffentlich zugänglich zu machen, nämlich durch die Einbeziehung des Codes in das Gesamtdesign ihrer Webseiten. Forrester zufolge ist die Einbettung eines Tweets im Sinne des „HTML-Code“ ein Prozess, der nur für „coders and web developers“ möglich ist, nicht aber für normale Twitter-Nutzer. Folglich haben die Beklagten das Urheberrecht des Fotografen verletzt. Nach Forrester können bloße technische Unterscheidungen, die für einen Nutzer unsichtbar sind, nicht Anknüpfungspunkte für die Feststellung einer Verletzung des Urheberrechts darstellen. Zusammenfassend ist *embedding* für die Nutzer sehr riskant geworden. Dies kann aus Sicherheitsgründen zur Ausschaltung dieser Funktion durch die *social media platforms* führen.

In diesem Zusammenhang ist besonders eine Vergleichsmöglichkeit zwischen der amerikanischen, deutschen und europäischen Rechtsprechung interessant. Nach der Entscheidung des BGH³, wer ein Bild, Video oder Text im Internet zugänglich macht, erklärt sich grundsätzlich zugleich mit dessen Einbettung durch andere Nutzer einverstanden. Die Nutzer stehen somit auf der sicheren Seite, währenddessen die

Interessen der Rechtsinhaber beeinträchtigt werden.

Nach dem EuGH stellt Embedding keinen Urheberrechtsverstoß dar, sofern zwei Voraussetzungen vorliegen (keine Erweiterung des Publikums und keine andere Wiedergabetechnik eingesetzt)⁴. Hierbei wird ebenso der Nutzer stärker als der Rechtsinhaber geschützt.

³ BGH, Urteil vom 9.07.2015, I ZR 46/12.

⁴ EuGH, Beschluss vom 21.10.2014, Az. C-348/13.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW
YORK

USDC SDNY

DOCUMENT

ELECTRONICALLY FILED

DOC #: _____

DATE FILED: FEBRUARY 15, 2018

JUSTIN GOLDMAN,

Plaintiff,

-v-

BREITBART NEWS NETWORK, LLC,
HEAVY, INC., TIME, INC., YAHOO,
INC., VOX MEDIA, INC., GANNETT
COMPANY, INC., HERALD MEDIA,
INC., BOSTON GLOBE MEDIA PART-
NERS, INC., and NEW ENGLAND
SPORTS NETWORK, INC.,

Defendants.

17-cv-3144 (KBF)

OPINION & ORDER

KATHERINE B. FORREST, District
Judge:

When the Copyright Act was amended in 1976, the words “tweet,” “viral,” and “embed” invoked thoughts of a bird, a disease, and a reporter. Decades later, these same terms have taken on new meanings as the centerpieces of an interconnected world wide web in which images are shared with dizzying speed over the course of any given news day. That technology and terminology change means that, from time to time, questions of copyright law will not be altogether clear. In answering questions with previously un contemplated technologies, however, the Court must not be distracted by new terms or new forms of content, but turn instead to familiar guiding principles of copyright. In this copyright infringement case, concerning a candid photograph of a famous sports figure, the Court must construe how images shown on one website but stored on another website’s server implicate an owner’s exclusive display right.

Today, many websites embed Twitter posts into their own content; for those familiar with digital news or other content, this is common knowledge. Here, plaintiff Justin Goldman’s copyrighted photo of Tom Brady went “viral”—rapidly moving from Snapchat to Reddit to Twitter—and finally, made its way onto the websites of the defendants, who

embedded the Tweet alongside articles they wrote about Tom Brady actively helping the Boston Celtics recruit basketball player Kevin Durant.

Plaintiff, claiming he never publicly released or licensed his photograph, filed suit against the defendant websites, claiming a violation of his exclusive right to display his photo, under § 106(5) of the Copyright Act.

With the consent of the parties, this Court divided the litigation into two phases—the first to determine whether defendants’ actions violate the exclusive right to display a work (here an embedded Tweet), and the second to deal with all remaining issues, such as the liability (or non-liability) for other defendants and any defenses that have been raised.

Defendants filed a motion for partial Summary Judgment on October 5, 2017. (ECF No. 119.) The Court heard oral argument on January 16, 2018.

Having carefully considered the embedding issue, this Court concludes, for the reasons discussed below, that when defendants caused the embedded

Tweets to appear on their websites, their actions violated plaintiff’s exclusive display right; the fact that the image was hosted on a server owned and operated by an unrelated third party (Twitter) does not shield them from this result. 3 Accordingly, defendants’ motion for partial Summary Judgment is DENIED. Partial Summary Judgment is GRANTED to the plaintiff.

I. FACTUAL BACKGROUND

The parties agree that the principle issue briefed on this motion is a legal one and amenable to summary judgment. The following facts are materially undisputed and all inferences are drawn in favor of the plaintiff.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

A. The Tom Brady Photo

On July 2, 2016, plaintiff Justin Goldman snapped a photograph of Tom Brady (the “Photo”), Danny Ainge, and others on the street in East Hampton. (ECF No. 149, Goldman Declaration (“Goldman Decl.”) ¶ 2.) Shortly thereafter, he uploaded the photograph to his Snapchat Story.¹¹ (Id. ¶ 5.) The Photo then went “viral,” traveling through

each photo is available for twenty-four hours only.

¹ Snapchat is a social media platform where users share photographs and messages; a Snapchat story is a series of photos a user posts—

several levels of social media platforms—and finally onto Twitter, where it was uploaded by several users, including Cassidy Hubbarth (@cassidyhubbarth), Bobby Manning (@RealBobManning), Rob H (@rch111), and Travis Singleton (@SneakerReporter). (Id. ¶¶ 6–10; ECF No. 120, Defendants’ Statement of Undisputed Facts Pursuant to Local Rule 56.1 (“Defs.’ 56.1 Statement”) ¶¶ 28.) These uploads onto Twitter are referred to as “Tweets.”

Defendants in this case are online news outlets and blogs who published articles featuring the Photo. Each of defendants’ websites prominently featured the Photo by “embedding” the Tweet into articles they wrote over the course of the next forty-eight hours; the articles were all focused on the issue of whether the Boston Celtics would successfully recruit basketball player Kevin Durant, and if Tom Brady would help to seal the deal.

It is undisputed that plaintiff holds the copyright to the Photo.

B. Embedding

None of the defendant websites copied and saved the Photo onto their own servers. Rather, they made the Photo

visible in their articles through a technical process known as “embedding.” Some background is helpful to an understanding of the embedding process.

A webpage is made up of a series of instructions usually written by coders in Hypertext Markup Language (“HTML”). These instructions are saved to a server (a computer connected to the internet), and when a user wishes to view a webpage, his or her computer’s browser connects with the server, at which point the HTML code previously written by the coder instructs the browser on how to arrange the webpage on the user’s computer. The HTML code can allow for the arrangement of text and/or images on a page and can also include photographs. When including a photograph on a webpage, the HTML code instructs the browser how and where to place the photograph. Importantly for this case, the HTML code could instruct the browser either to retrieve the photograph from the webpage’s own server or to retrieve it from a third-party server.

“Embedding” an image on a webpage is the act of a coder intentionally adding a specific “embed” code to the HTML instructions that incorporates an image, hosted on a third-party server, onto a

webpage. To embed an image, the coder or web designer would add an “embed code” to the HTML instructions; this code directs the browser to the third-party server to retrieve the image. An embedded image will then hyperlink (that is, create a link from one place in a hypertext document to another in a different document) to the third-party website. The result: a seamlessly integrated webpage, a mix of text and images, although the underlying images may be hosted in varying locations. Most social media sites— Facebook, Twitter, and YouTube, for example— provide code that coders and web designers can easily copy in order to enable embedding on their own webpages.

Here, it is undisputed that none of the defendant websites actually downloaded the Photo from Twitter, copied it, and stored it on their own servers. Rather, each defendant website merely embedded the Photo, by including the necessary embed code in their HTML instructions. As a result, all of defendants’ websites included articles about the meeting between Tom Brady and the Celtics, with the full-size Photo visible without the user having to click on a hyperlink, or a thumbnail, in order to view the Photo.

II. LEGAL PRINCIPLES

A. Summary Judgment Standard

This Court applies the well-known summary judgment standard set forth in Rule 56 of the Federal Rules of Civil Procedure. Summary Judgment may not be granted unless a movant shows, based on admissible evidence in the record, “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating “the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When the moving party does not bear the ultimate burden on a particular claim or issue, it need only make a showing that the non-moving party lacks evidence from which a reasonable jury could find in the non-moving party’s favor at trial. *Id.* at 322–23.

In making a determination on summary judgment, the court must “construe all evidence in the light most favorable to the non-moving party, drawing all inferences and resolving all ambiguities in its favor.” *Dickerson v. Napolitano*, 604 F.3d 732, 740 (2d Cir. 2010) (citing *LaSalle Bank Nat’l Ass’n v. Nomura*

Asset Capital Corp., 424 F.3d 195, 205 (2d Cir. 2005)). Once the moving party has discharged its burden, the opposing party must set out specific facts showing a genuine issue of material fact for trial. Wright v. Goord, 554 F.3d 255, 266 (2d Cir. 2009). “A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment,” as “mere conclusory allegations or denials cannot by themselves create a genuine issue of material fact where none would otherwise exist.” Hicks v. Baines, 593 F.3d 159, 166 (2d Cir. 2010) (internal quotation marks, citations, and alterations omitted).

“In considering a motion for summary judgment, if our analysis reveals that there are no genuine issues of material fact, but that the law is on the side of the non-moving party, we may grant summary judgment in favor of the non-moving party even though it has made no formal cross-motion.” Orix Credit Alliance, Inc. v. 7 Horten, 965 F. Supp. 481, 484 (S.D.N.Y. 1997) (citing Int’l Union of Bricklayers v. Gallante, 912 F. Supp. 695, 700 (S.D.N.Y. 1996); see also Coach Leatherware Co. v. AnnTaylor, Inc., 933 F.2d 162, 167 (2d Cir. 1991) (“[I]t is most desirable that the court cut through mere outworn

procedural niceties and make the same decision as would have been made had defendant made a cross-motion for summary judgment.” (citing Local 33, Int’l Hod Carriers v. Mason Tenders Dist. Council, 291 F.2d 496, 505 (2d Cir. 1961))). “Summary judgment may be granted to the non-moving party in such circumstances so long as the moving party has had an adequate opportunity to come forward with all of its evidence.” Orix Credit Alliance, 965 F. Supp. at 484. (citing Cavallaro v. Law Office of Shapiro & Kreisman, 933 F. Supp. 1148, 1152 (E.D.N.Y. 1996)).

B. The Copyright Act

“From its beginning, the law of copyright has developed in response to significant changes in technology.” Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984). Copyright protections “subsists . . . in original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). The Copyright Act of 1976, enacted in response to changing technology, gives a copyright owner several “exclusive rights,” including the exclusive right to “display the copyrighted work publicly.” 17 U.S.C. § 106(5). To display a work, under the Act, is to “show a copy of it, either

directly or by means of a film, slide, television image, or any other device or process.” 17 U.S.C. § 101 (emphasis added). The Act’s Transmit Clause defines that exclusive right as including the right to “transmit or otherwise communicate . . . a display of the work . . . to the public, by means of any device or process.” *Id.* It further defines “device or process” as “one now known or later developed.” *Id.*

A review of the legislative history reveals that the drafters of the 1976 Amendments intended copyright protection to broadly encompass new, and not yet understood, technologies. Indeed, on the first page of the House Report, the drafters proclaimed that the Amendments were necessary in part because “technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works;” furthermore, Congress did “not intend to freeze the scope of copyrightable subject matter at the present stage of communications technology.” H.R. Rep. 94-1476, 47, 51 (1976).

Specifically, in considering the display right, Congress cast a very wide net, intending to include “[e]ach and every method by which the images . . . comprising a . . . display are picked up and

conveyed,” assuming that they reach the public. *Id.* at 64 (emphasis added). It further noted that “‘display’ would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system.” *Id.* (emphasis added). Indeed, an infringement of the display right could occur “if the image were transmitted by any method (by closed or open circuit television, for example, or by a computer system) from one place to members of the public elsewhere.” *Id.* at 80 (emphasis added).

The Register of Copyrights testified during hearings that preceded the passage of the Act: “[T]he definition [of the display right] is intended to cover every transmission, retransmission, or other communication of [the image],” beyond the originating source that might store the image, but including “any other transmitter who picks up his signals and passes them on.” H. Comm. On the Judiciary, 89th Cong., Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, at 25 (Comm. Print.

1965). He highlighted the importance of the display right in light of changing technology, specifically warning that “information storage and retrieval devices . . . when linked together by communication satellites or other means . . . could eventually provide libraries and individuals throughout the world with access to a single copy of a work by transmission of electronic images” and therefore that “a basic right of public exhibition should be expressly recognized in the statute.” *Id.* at 20 (emphasis added).

C. American Broadcasting Cos., Inc. v. Aereo, Inc.

The Supreme Court most recently considered the intersection of novel technologies and the Copyright Act in the *Aereo* decision, rendered in 2014. American Broadcasting Cos., Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014). The issue in *Aereo* was the performance right; the Court was deciding whether *Aereo* “infringed this exclusive right by selling its subscribers a technologically complex service that allows them to watch television programs over the Internet at about the same time as the programs are broadcast over the air.” *Id.* at 2503. *Aereo* charged a monthly fee to allow subscribers to watch

broadcast television programming over the internet; it maintained a vast number of servers and antennas in a central warehouse. When a user wanted to watch a program, he would visit *Aereo*’s website and select a show; in turn, *Aereo*’s servers would select an antenna, tune it to the on-air broadcast, and transmit it via the internet to the subscriber. *Aereo* argued that since the user chose the programs and *Aereo*’s technology merely responded to the user’s choice, it was the user and not *Aereo* who was in fact “transmitting” the performance.

The Court rejected this analysis, comparing *Aereo* to the cable companies that parts of the 1976 Amendments were intended to reach. When comparing cable technology (where the signals “lurked behind the screen”) to *Aereo*’s technology (controlled by a click on a website), the Court stated: “[T]his difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system into ‘a copy shop that provides its patrons with a library card.’” *Id.* at 2507.

Even the dissent, which would have found no liability based on the lack of Aereo's volition in choosing which programming to make available, stated that where the alleged infringer plays no role in selecting the content, it cannot be held directly liable when a customer makes an infringing copy: "Aereo does not 'perform' for the sole and simple reason that it does not make the choice of content." *Id.* at 2514 (Scalia, J., dissenting). 11

D. The "Server Test"

Defendants urge this Court to define the scope of the display right in terms of what they refer to as the "Server Test." According to defendants, it is "well settled" law and the facts of this case call for its application. As set forth below, the Court does not view the Server Test as the correct application of the law with regard to the facts here. Nevertheless, it is useful to briefly chronicle the body of law that has developed in that area and explain why it is inapplicable.

In Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007) ("Perfect 10 II"), the Ninth Circuit considered a claim of direct infringement of the display right against Google based upon Google Image Search. The district court addressed two different questions: 1)

did the thumbnail images that automatically pop up when a user types in a search term constitute direct infringements of the display right; and 2) did the full size images that appeared on the screen after a user clicked on a thumbnail constitute direct infringements of the same display right. In answer, the court made a sharp distinction between the two based upon where the images were hosted. Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 839 (C.D. Cal. 2006) ("Perfect 10 I"). First, it found the thumbnails to be infringing, based on the fact that they were stored on Google's server. *Id.* at 844. Conversely, it held that the full size images, which were stored on third-party servers and accessed by "in-line linking"—which works, like embedding, based upon the HTML code instructions—were not infringements. *Id.* In so doing, the court rejected the plaintiff's proposed Incorporation Test, which would define display as the "act of 12 incorporating content into a webpage that is then pulled up by the browser." *Id.* at 839. It adopted instead the Server Test, where whether a website publisher is directly liable for infringement turns entirely on whether the image is hosted on the publisher's own server, or is embedded or linked from a third-party server.

On appeal, the Ninth Circuit affirmed.² In the Ninth Circuit, therefore, at least as regards a search engine, the “Server Test” is settled law.

Defendants here argue that Perfect 10 is part of an “unbroken line of authority” on which this Court should rely in determining broadly whether a copyright owner’s display right has been violated. Outside of the Ninth Circuit, however, the Server Test has not been widely adopted. Even a quick survey reveals that the case law in this area is somewhat scattered. Of the other Circuits, only the Seventh Circuit has weighed in thus far—in Flava Works, Inc. v. Gunter, 689 F.3d 754 (7th Cir. 2012), the question before the court was whether the defendant was a contributory infringer. Defendant in that case, a “social bookmark,” whose service involved enabling individuals who share interests to point each other towards online materials (in this case, videos) that cater towards that taste, through embedding the code for the video onto its website. The videos remained hosted on the original servers. As with Perfect 10, upon arriving on defendant’s website, thumbnails would appear; after clicking on one, the user would retrieve content

from plaintiff’s website. The Flava Court found that defendants were not contributory infringers; the question of direct infringement was never reached. The lower court, however, had opined that “[t]o the extent that Perfect 10 can be read to stand for the proposition that in-line linking can never cause a display of images or videos that would give rise to a claim of direct copyright infringement, we respectfully disagree. In our view, a website’s servers need not actually store a copy of the work in order to ‘display’ it.” Flava Works, Inc. v. Gunter, 2011 WL 3876910, at *4 (N.D. Ill. Sept. 1, 2011), rev’d on other grounds, 689 F.3d 754 (7th Cir. 2012) (emphasis added).

Four courts in this District have discussed the Server Test and Perfect 10’s holding; none adopted the Server Test for the display right. First, in Live Face on Web, LLC v. Biblio Holdings LLC, 2016 WL 4766344 (S.D.N.Y. Sept. 12, 2016), the issue before the court was the distribution right, not the display right. Defendant argued that a distribution had not occurred, since the alleged infringing content was hosted on a third-party server, and not its own. The court noted that defendant cited no legal

² It found, however, that “Google is likely to succeed in proving its fair use defense” as to the thumbnail images.

authority for this proposition, but stated that “such authority may exist,” citing Perfect 10. Id. at *4. The court did not adopt the Server Test; rather, it held that additional discovery was necessary as the issue had “hardly” been briefed. Id. at *5. Second, in MyPlayCity, Inc., v. Conduit Ltd., 2012 WL 1107648 (S.D.N.Y. Mar. 30, 2012), the distribution right was again at issue. In that case, when the user clicked a “play now” button on the defendant’s customized tool bar, it would be able to play games hosted on the plaintiff’s servers. The court cited Perfect 10 and then found that, due to the fact that plaintiff’s servers “‘actually disseminated’ the copies of [plaintiff’s] copyrighted games, [defendant] cannot be held liable for infringing on [plaintiff’s] distribution rights.” Id. at *14. Third, in Pearson Education, Inc. v. Ishayev, 963 F. Supp. 2d 239 (S.D.N.Y. 2013), the court held that standard text hyperlinks (not including images) that users click in order to view and visit other sites were not a use of infringing content, relying in part on Perfect 10; the exclusive right at issue here, too, was the distribution right.

Only the fourth case in this District, Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640 (S.D.N.Y. 2013)

squarely dealt with the § 106(5) display right. There, however, the court did no more than offer a simple factual statement, “The Ninth Circuit has held that the display of a photographic image on a computer may implicate the display right, though infringement hinges, in part, on where the image was hosted.” Id. at 652 (emphasis added). It then proceeded to deny summary judgment based on material disputes as to the content of the allegedly infringing issues. Id.

Additionally, in a trademark decision rendered in this District prior to Perfect 10, when considering whether defendant Tunes was liable for trademark infringement to the Hard Rock Café for “framing” the Hard Rock logo on their website, the court held that it was. Hard Rock Café Int’l v. Morton, 1999 WL 717995 (S.D.N.Y. Sept. 9, 1999). After considering both the fact that “it [was] not clear to the computer user that she or he has left the [plaintiff’s] web site” and the fact that there was a “seamless presentation” on the website, the court found that “the only possible conclusion is that the Hard Rock Hotel Mark is used or exploited to advertise and sell CDS.” Id. at *25.

Only a handful of other district courts have considered the issue.³ In Grady v. Iacullo, 2016 WL 1559134 (D. Colo. Apr. 18, 2016), the court considered the exclusive reproduction and distribution rights, and, relying on Perfect 10, reopened discovery in order to allow plaintiff an opportunity to show that defendant stored the allegedly infringing images on his own computer.⁴ In another recent district court case, plaintiff survived the motion to dismiss stage in a distribution case, based on the theory that each time a user used defendant's website, it "cause[d] a copy of [plaintiff's] software to be distributed to the website visitor's computer in cache, memory, or hard drive" and that the "[defendant's] website distributed copies of the code to each of the website's visitors." Live Face on Web, LLC v. Smart Move Search, Inc., 2017 WL 1064664 (D.N.J. Mar. 21, 2017), at *2.

Finally, in The Leader's Institute, LLC v. Jackson, 2017 WL 5629514 (N.D. Tex. Nov. 22, 2017), at issue on summary judgment was, *inter alia*, whether plaintiffs infringed defendant's exclusive display rights by "framing" defendant's websites. The court rejected Perfect 10,

holding that by "framing the defendant's copyrighted works, the plaintiffs impermissibly displayed the works to the public." Id. at *10. It distinguished Perfect 10 on its facts, noting that, "[U]nlike Google, [plaintiffs' website] did not merely provide a link by which users could access [defendant's] content but instead displayed [defendant's] content as if it were its own." Id. at *11. It further stated: "[T]o the extent Perfect 10 makes actual possession of a copy a necessary condition to violating a copyright owner's exclusive right to display the copyrighted works, the Court respectfully disagrees with the Ninth Circuit. . . . The text of the Copyright Act does not make actual possession of a work a prerequisite for infringement." Id.

In sum, this Court is aware of only three decisions outside of the Ninth Circuit considering the display right in light of Perfect 10; one from the Seventh Circuit which adopted the Server Test for contributory liability, one from the Southern District which stated as a factual matter only that Perfect 10 existed, and one from the Northern District of Texas rejecting Perfect 10.

³ The Court does not here review district court cases from the Ninth Circuit, as they are appropriately controlled by Perfect 10's analysis.

⁴ It subsequently granted summary judgment to the plaintiff upon a showing that the defendant had, in fact, downloaded the images onto his computer.

III. DISCUSSION

Defendants' argument is simple—they have framed the issue as one in which the physical location and/or possession of an allegedly infringing image determines liability under the § 106(5) exclusive display right. Defendants argue that—despite the seamless presentation of the Brady Photo on their webpages—they simply provided “instructions” for the user to navigate to a third-party server on which the photo resided. According to defendants, merely providing instructions does not constitute a “display” by the defendants as a matter of law. They maintain that Perfect 10's Server Test is settled law that should determine the outcome of this case.

Plaintiff maintains both 1) that to apply the Server Test leads to results incongruous with the purposes and text of the Copyright Act; and 2) even if the Server Test is rightfully applied in a case such as Perfect 10, or another case in 17 which the user takes a volitional action of his own to display an image, it is inappropriate in cases such as those here, where the user takes no action to “display” the image.

He and his amici⁵ caution that to adopt the Server Test broadly would have a “devastating” economic impact on photography and visual artwork licensing industries, noting that it would “eliminate” the incentives for websites to pay licensing fees, and thus “deprive content creators of the resources necessary to invest in further creation.” (ECF No. 145-1 at 4.)

The Court agrees with plaintiff. The plain language of the Copyright Act, the legislative history undergirding its enactment, and subsequent Supreme Court jurisprudence provide no basis for a rule that allows the physical location or possession of an image to determine who may or may not have “displayed” a work within the meaning of the Copyright Act. Moreover, the Court agrees that there are critical factual distinctions between Perfect 10 and this case such that, even if the Second Circuit were to find the Server Test consistent with the Copyright Act, it would be inapplicable here.

A. The Copyright Act

⁵ Getty Images, the American Society of Media Photographers, Digital Media Licensing Association, National Press Photographers

Association, and North American Nature Photography Association submitted an amicus brief supporting plaintiff. (ECF No. 145-1.)

Nowhere does the Copyright Act suggest that possession of an image is necessary in order to display it. Indeed, the purpose and language of the Act support the opposite view. The definitions in § 101 are illuminating. First, to display a work publicly means to “to transmit . . . a . . . display of the work . . . by means of any device or process.” 17 USC § 101. To transmit a display is to “communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.” Id. (emphasis added). Devices and processes are further defined to mean ones “now known or later developed.” Id. This is plainly drafted with the intent to sweep broadly.

Here, defendants’ websites actively took steps to “display” the image. A review of just a few of the declarations proffered by defendants illustrates the point. For defendant Heavy.com:

[I]n order to embed the SneakerReporter Tweet, Heavy.com navigated to Twitter and copied the SneakerReporter Tweet’s URL. Heavy.com then used out of the box content management functionality provided by WordPress to embed the SneakerReporter Tweet within the Heavy.com Article.

(ECF No. 130, Nobel Decl. ¶ 5.).

Defendant Boston Herald “pasted a code line into its blog/article that contains Twitter HTML instructions.” (ECF No. 137, Emond Decl. ¶ 16.)

Defendant The Big Lead submitted a declaration in which the managing editor stated, “My entering the URL for the RealBobManningTweet into the field for embedded content in the CMS [content management system] caused this URL to be inserted into embedding code that became part of the HTML code for the Big Lead Article.” (ECF No. 127, Lisk Decl. ¶ 7.)

Defendant Gannett submitted a declaration in which the Vice President stated that:

[I]f I wanted that web page to display a photo that a third party user had posted to a site like Twitter, I could do so without me ever having to make a copy of the photo. I would simply include in my HTML code some additional coding containing a link to the URL of the Twitter page where the photo appeared.

(ECF No. 126, Hiland Decl. ¶ 6) (emphasis added).

It is clear, therefore, that each and every defendant itself took active steps to put a process in place that resulted in a transmission of the photos so that

they could be visibly shown. Most directly this was accomplished by the act of including the code in the overall design of their webpage; that is, embedding. Properly understood, the steps necessary to embed a Tweet are accomplished by the defendant website; these steps constitute a process. The plain language of the Copyright Act calls for no more.

Indeed, and as discussed above, the Copyright Act's authors intended to include "each and every method by which images . . . comprising a . . . display are picked up and conveyed;" moreover they went as far as to note that an infringement of the display right could occur "if the image were transmitted by any method (. . . for example, by a computer system) from one place to members of the public elsewhere." H.R. Rep. 94-1476, 64, 70 (1976). Persuasive as well is the warning of the Register of Copyrights that a "basic right of public exhibition" was necessary to the 1976 Amendments precisely because "information storage and retrieval devices . . . when linked together by communication satellites or other means . . . could eventually provide libraries and individuals throughout the world with access to a single copy or a work by transmission of electronic images." H. Comm. On the

Judiciary, 89th Cong., Copyright Law Revision Part 6: Supplementary Report of the 20 Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, at 25 (Comm. Print. 1965).

In sum, this Court sees nothing in either the text or purpose of the Copyright Act suggesting that physical possession of an image is a necessary element to its display for purposes of the Act.

B. Aereo's Impact

Moreover, though the Supreme Court has only weighed in obliquely on the issue, its language in Aereo is instructive. At heart, the Court's holding eschewed the notion that Aereo should be absolved of liability based upon purely technical distinctions—in the end, Aereo was held to have transmitted the performances, despite its argument that it was the user clicking a button, and not any volitional act of Aereo itself, that did the performing. The language the Court used there to describe invisible technological details applies equally well here: "This difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform

a system that is for all practical purposes a traditional cable system into a ‘copy shop that provides patrons with a library card.’” Aereo, 134 S. Ct. at 2507.

Of course, in Aereo there was no argument about the physical location of the antennae, which were without dispute located in Aereo’s warehouses; similarly there was no dispute that Aereo’s servers saved data from the on-air broadcasts onto its own hard drives. On the other hand, Aereo was arguably a more passive participant in transmitting the performance right than is a user in the case here—who has no choice in what is displayed to him when he navigates to one of defendant’s webpages. Furthermore, the principles that undergird the Aereo decision—chief among them that mere technical distinctions invisible to the user should not be the lynchpin on which copyright liability lies—apply with equal vigor here.

As noted above, even the dissent implies that were Aereo to engage in any sort of curatorial process as to content, that liability might lie: “In sum, Aereo does not perform for the sole and simple reason that it does not make the choice of content.” Id. at 2514 (Scalia, J., dissenting). This adds credence to the notion that where, as here,

defendants are choosing the content which will be displayed, that they would indeed be displaying.

In sum, this Court reads Aereo, while not directly on point, as strongly supporting plaintiff’s argument that liability should not hinge on invisible, technical processes imperceptible to the viewer.

C. Perfect 10

The Court declines defendants’ invitation to apply Perfect 10’s Server Test for two reasons. First, this Court is skeptical that Perfect 10 correctly interprets the display right of the Copyright Act. As stated above, this Court finds no indication in the text or legislative history of the Act that possessing a copy of an infringing image is a prerequisite to displaying it. The Ninth Circuit’s analysis hinged, however, on making a “copy” of the image to be displayed—which copy would be stored on the server. It stated that its holding did not “erroneously collapse the 22 display right in section 106(5) into the reproduction right in 106(1).” Perfect 10 II, 508 F.3d at 1161. But indeed, that appears to be exactly what was done.

The Copyright Act, however, provides several clues that this is not what was

intended. In several distinct parts of the Act, it contemplates infringers who would not be in possession of copies—for example in Section 110(5)(A) which exempts “small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customer’s enjoyment” from liability. H.R. Rep. No. 94-1476 at 87 (1976). That these establishments require an exemption, despite the fact that to turn on the radio or television is not to make or store a copy, is strong evidence that a copy need not be made in order to display an image.

Second, even if it correctly interprets the Act, to the degree that defendants interpret Perfect 10 as standing for a broadly-construed Server Test, focusing on the physical location of allegedly infringing images, this Court disagrees. Rather, Perfect 10 was heavily informed by two factors—the fact that the defendant operated a search engine, and the fact that the user made an active choice to click on an image before it was displayed—that suggest that such a broad reading is neither appropriate nor desirable.

In Perfect 10, the district court’s Opinion, while not strictly cabining its

adoption of the Server Test to a search engine like Google, nevertheless relied heavily on that fact in its analysis. It stated, for example, that adopting the Server Test “will merely preclude search engines from being held directly liable for in-line 23 linking and or framing infringing contents stored on third-party websites.” Perfect 10 I, 416 F. Supp. 2d at 844 (emphasis added). It went on: “Merely to index the web so that users can more readily find the information they seek should not constitute direct infringement” Id. (emphasis added). On appeal, the Ninth Circuit began its statement of the case by saying, “we consider a copyright owner’s efforts to stop an Internet search engine from facilitating access to infringing images.” Perfect 10 II, 508 F.3d at 1154.

In addition, the role of the user was paramount in the Perfect 10 case—the district court found that users who view the full-size images “after clicking on one of the thumbnails” are “engaged in a direct connection with third-party websites, which are themselves responsible for transferring content.” Perfect 10 I, 416 F. Supp. 2d at 843.

In this Court’s view, these distinctions are critical. In Perfect 10, Google’s

search engine provided a service whereby the user navigated from webpage to webpage, with Google's assistance. This is manifestly not the same as opening up a favorite blog or website to find a full color image awaiting the user, whether he or she asked for it, looked for it, clicked on it, or not. Both the nature of Google Search Engine, as compared to the defendant websites, and the volitional act taken by users of the services, provide a sharp contrast to the facts at hand.

In sum, the Court here does not apply the Server Test. It is neither appropriate to the specific facts of this case, nor, this Court believes, adequately grounded in the text of the Copyright Act. It therefore does not and should not control the outcome here.

D. Defenses

Defendants warn that to find for plaintiff here would "cause a tremendous chilling effect on the core functionality of the web." (ECF No. 121, Defs.' Mem. of Law in Supp. at 35) (quoting Perfect 10 I, 426 F. Supp. 2d at 840). Their amici⁶ warn that not adopting the Server Test

here would "radically change linking practices, and thereby transform the Internet as we know it."

The Court does not view the results of its decision as having such dire consequences. Certainly, given a number as of yet unresolved strong defenses to liability separate from this issue, numerous viable claims should not follow.

In this case, there are genuine questions about whether plaintiff effectively released his image into the public domain when he posted it to his Snapchat account. Indeed, in many cases there are likely to be factual questions as to licensing and authorization. There is also a very serious and strong fair use defense, a defense under the Digital Millennium Copyright Act, and limitations on damages from innocent infringement.

In sum, for all the reasons discussed above, the Court DENIES defendants' motion for partial summary judgment and GRANTS partial summary judgment to the plaintiff.

IV. CONCLUSION

(Amicus Brief of the Electronic Frontier Foundation and Public Knowledge in Support of Defendants' Motion for Partial Summary Judgment.)

⁶ The Electronic Frontier Foundation, a non-profit foundation dedicated to free expression, and Public Knowledge, a not-for-profit public interest advocacy and research organization, submitted an amicus brief at ECF No. 143-1.

For the reasons stated above, defendants' motion for partial Summary Judgment is DENIED. The Court GRANTS partial Summary Judgment to the plaintiff. The Clerk of Court is directed to terminate the motion at ECF No. 119.

SO ORDERED.

Dated: New York, New York
 February 15, 2018

KATHERINE B. FORREST
United States District Judge

**BUNDESGERICHTSHOF VI ZR 76/17
VOM 06. FEBRUAR 2018 - ZULÄS-
SIGKEIT EINER OHNE EINWILLI-
GUNG ERFOLGFTEN VERÖFFENT-
LICHUNG VON FOTOS DES EHEMA-
LIGEN STAATSOBERHAUPTES**

Der Kläger ist ehemaliger Bundespräsi-
dent, die Beklagte ein Zeitschriftenver-
lag. Der Kläger begehrt die Unterlas-
sung einer Bildberichterstattung, die
den Kläger und seine Ehefrau unter An-
deren mit einem gefüllten Einkaufswa-
gen zeigt. Der Text mit der streitgegen-
ständlichen Bildberichterstattung trug
die Überschrift: „Nach der Versöhnung
– Christian Wulff - Wer Bettina liebt, der
schiebt!“.

Der VI. Zivilsenat des Bundesgerichts-
hofs hat die Vorentscheidungen aufge-
hoben und die Klage abgewiesen.

Die veröffentlichten Fotos seien dem
Bereich der Zeitgeschichte zuzuord-
nen, vgl. § 23 Abs. 1 Nr. 1 KunstUrhG
und dürften daher auch ohne Einwilli-
gung des Klägers, vgl. § 22 KunstUrhG,
verbreitet werden, da berechnigte Inte-
ressen des Klägers nicht verletzt wür-
den.

In der Abwägung komme der durch Art.
5 I GG geschützten Pressefreiheit ge-
genüber dem Persönlichkeitsrecht des
Klägers der Vorrang zu. Es sei bei der
Abwägung zu berücksichtigen, dass die

besondere politische Bedeutung des
Klägers als Staatsoberhaupt und das
damit einergehende öffentliche Inte-
resse an seiner Person nicht mit seinem
Rücktritt vom Amt des Bundespräsi-
den ten endete, sondern vielmehr nach-
wirke. Das zeige sich unter anderem
darin, dass der Kläger als „Altbundes-
präsident“ weiterhin zahlreichen politi-
schen und gesellschaftlichen Verpflich-
tungen nachgeht. Die Veröffentlichun-
gen leisteten einen Beitrag zu eier Dis-
kussion des öffentlichen Interesses und
nähmen außerdem Bezug auf die vom
Kläger am 6. Mai 2015 herausgege-
bene Pressemitteilung, dass er und
seine Frau wieder zusammen lebten.

Schließlich sei zu berücksichtigen, dass
die zur Einkaufszeit auf dem Parkplatz
eines Supermarktes und damit im öf-
fentlichen Raum aufgenommenen Fo-
tos lediglich die Sozialsphäre des Klä-
gers tangiere.

Schließlich komme somit den entge-
genstehenden berechtigten Interessen
des Klägers kein überwiegendes Ge-
wicht, vgl. § 23 Abs. 2 KunstUrhG, zu.



BUNDESGERICHTSHOF

IM NAMEN DES VOLKES

URTEIL

VI ZR 76/17

Verkündet am: ^[17]~~SEP~~ 6. Februar 2018 Böh-
ringer-Mangold Justizamtsinspektorin
als Urkundsbeamtin der Geschäfts-
stelle

in dem Rechtsstreit

Nachschlagewerk: ja

BGHZ: ^[17]~~SEP~~ nein

BGHR: ja

in dem Rechtsstreit

KUG §§ 22, 23; BGB §§ 823 Abs. 1 Ah,
1004 Abs. 1

Zur Zulässigkeit einer ohne Einwilligung
erfolgten Veröffentlichung von Fotos,
die ein ehemaliges Staatsoberhaupt
nach einem Großeinkauf auf dem Park-
platz eines Supermarktes zeigen.

BGH, Urteil vom 6. Februar 2018 - VI
ZR 76/17 - OLG Köln LG Köln

Der VI. Zivilsenat des

Bundesgerichtshofs hat auf die mündli-
che Verhandlung vom 6. Februar 2018
durch den Vorsitzenden Richter Galke,
den Richter Wellner, die Richterinnen
von Pentz und Dr. Oehler und den Rich-
ter Dr. Klein

für Recht erkannt:

Auf die Revision der Beklagten
wird das Urteil des 15. Zivilse-
nats des Oberlandesgerichts
Köln vom 19. Januar 2017 aufge-
hoben.

Auf die Berufung der Beklagten
wird das Urteil der 28. Zivilkam-
mer des Landgerichts Köln vom
27. April 2016 abgeändert und
die Klage abgewiesen.

Der Kläger trägt die Kosten des
Rechtsstreits.

Von Rechts wegen

Tatbestand:

Der Kläger nimmt die Beklagte auf Un-
terlassung einer Bildberichterstattung in
Anspruch.

Der Kläger war vom 30. Juni 2010 bis
zu seinem Rücktritt am 17. Februar
2012 Bundespräsident der Bundesre-
publik Deutschland. Im Januar 2013

wurde die Trennung von ihm und seiner Frau Bettina öffentlich. Mit Pressemitteilung vom 6. Mai 2015 bestätigte ein Rechtsanwalt des Klägers in dessen Auftrag, dass der Kläger und seine Frau wieder zusammen lebten. Bettina und Christian Wulff bäten nachdrücklich darum, die ihrer Familie zustehende Privatsphäre zu respektieren. Sollte die Privatsphäre der Familie - etwa durch Nachstellungen von Fotografen - verletzt werden, seien die Anwälte beauftragt, mit allen rechtlichen Mitteln vorzugehen.

Die Beklagte verlegte u.a. die Illustrierten NEUE POST und PEOPLE. Am 13. Mai 2015 veröffentlichte die Beklagte in der Wochenzeitschrift PEOPLE unter der Überschrift "Liebes-Comeback" u.a. zwei Fotos, von denen das eine den Kläger und seine Ehefrau gemeinsam an ihrem Auto (im Folgenden: Auto-Foto), das andere den Kläger beim Schieben eines vollen Einkaufswagens zeigt. In dem Begleittext zu den Bildern heißt es u.a.: "Liebe ist ... mit seiner Frau zusammen für die Familie einzukaufen. Letzten Samstag schob der CDU-Politiker Christian Wulff, 55, einen vollbepackten Einkaufswagen aus einem Supermarkt (...) Am Auto wartete schon seine Frau (...) Knapp zwölf Monate nach seinem Rücktritt als Bundespräsident (...) hatte sich das Paar

getrennt (...) Erst vor wenigen Wochen wurde die Scheidung (...) eingereicht (...) Nun wohnen sie wieder zusammen mit den zwei Söhnen (...) ‚Es ist zutreffend, dass Bettina und Christian Wulff wieder zusammenleben‘, erklärte Wulffs Anwalt (...)."

Am 20. Mai 2015 berichtete die Beklagte in der Wochenzeitschrift NEUE POST unter der Überschrift "Nach der Versöhnung - Christian Wulff - Wer Bettina liebt, der schiebt" ausführlicher über den Supermarkteinkauf und bebilderte den Artikel u.a. mit einem nahezu identischen Foto des Klägers beim Schieben des Einkaufswagens (im Folgenden: Einkaufswagen-Foto). In dem Artikel heißt es u.a.: "Mineralwasser, ein Baguette-Brot, Salat, Schokoküsse und vieles mehr ... Brav hat Christian Wulff (55) den Einkaufszettel abgearbeitet und alles aus dem Supermarkt (...) besorgt, was Ehefrau Bettina (41) ihm wohl vorher aufgeschrieben hat. Seit der überraschenden Versöhnung der beiden vor wenigen Tagen (NEUE POST berichtete) gilt anscheinend: Der ehemalige Bundespräsident ist nun für den Großeinkauf der Familie verantwortlich (...)." In das Foto ist folgender Text eingeschoben: "Hab den Wagen vollgeladen ... Christian Wulff beim Großeinkauf. Glücklicherweise sieht er hier aber nicht aus".

Das Landgericht hat die Beklagte antragsgemäß verurteilt, es zu unterlassen, das Auto-Foto aus der PEOPLE-Berichterstattung vom 13. Mai 2013 und das Einkaufswagen-Foto aus der NEUE POST-Berichterstattung vom 20. Mai 2015 zu veröffentlichen. Die Berufung der Beklagten hat das Oberlandesgericht zurückgewiesen. Mit der vom Senat zugelassenen Revision verfolgt die Beklagte ihr Klageabweisungsbegehren weiter.

Entscheidungsgründe:

I.

6 Das Berufungsgericht hat die angegriffene Bildberichterstattung nach §§ 22, 23 Abs. 1 Nr. 1 KUG als unzulässig erachtet. Die mangels Einwilligung des Klägers erforderliche Abwägung der verfassungsrechtlich geschützten Belange der Parteien führe zu der Feststellung, dass es sich im Zusammenhang mit der Wortberichterstattung nicht um Bildnisse der Zeitgeschichte (§ 23 Abs. 1 Nr. 1 KUG) handele, jedenfalls aber berechnete Interessen des Klägers verletzt seien (§ 23 Abs. 2 KUG).

7 Zwar zeigten die Fotos den Kläger in einer Alltagssituation im öffentlichen Raum und seien als solche nicht abträglich. Zugleich habe der Kläger in

der Vergangenheit sein Ehe- und Familienleben in die Öffentlichkeit getragen und sich insoweit selbst geöffnet ("mediale Inszenierung"). Auch nach seinem Rücktritt vom Amt des Bundespräsidenten habe der Kläger sein Privatleben nicht situationsübergreifend und konsistent verschlossen. Es bestehe ein erhebliches öffentliches Interesse am Leben des - weiter politisch und gesellschaftlich engagierten - Klägers. Zugleich könne den Artikeln nicht jedes Berichterstattungsinteresse abgesprochen werden. In den Artikeln werde über die Wende im Beziehungsleben des Klägers und seiner Ehefrau berichtet. Die streitgegenständlichen Bilder hätten eine gewisse Belegfunktion diesbezüglich und bezüglich der vom Kläger nunmehr wahrgenommenen familiären Pflichten (Erledigung des Wocheneinkaufs). Schließlich stünden die Artikel in zeitlichem Zusammenhang mit der vom Rechtsanwalt des Klägers veröffentlichten Presseerklärung.

8 Trotz alledem überwiegen letztlich die Interessen des Klägers. Die Fotos seien der Privatsphäre des Klägers zuzuordnen. Sie beträfen einen völlig belanglosen Vorgang; der Berichterstattung fehle jeder Bezug zur politischen Tätigkeit des Klägers. Es gehe ausschließlich um das Privatleben des Klägers und dessen Beziehung zu

seiner Ehefrau. Das Interesse hieran könne auch durch Beifügung von genehmigten oder genehmigungsfrei verwendbaren Fotos befriedigt werden. Gerade der Neuanfang vormals getrennt lebender Eheleute sei oftmals schwierig und werde durch die "Blicke der Öffentlichkeit" zusätzlich erschwert. Die frühere Zusammenarbeit des Klägers und seiner Ehefrau mit der Presse sei allein kein Grund, ihm jeden Schutz vor einer Veröffentlichung von Fotos zu nehmen.

II.

9 Diese Beurteilung hält revisionsrechtlicher Überprüfung nicht stand. Das Berufungsgericht hat die in besonderer Weise herausgehobene Stellung des Klägers als ehemaliges Staatsoberhaupt, den Kontext der beanstandeten Bildberichterstattung sowie das Ausmaß der vom Kläger in der Vergangenheit praktizierten Selbstöffnung nicht hinreichend berücksichtigt und deshalb rechtsfehlerhaft dem Persönlichkeitsrecht des Klägers den Vorrang vor der durch Art. 5 Abs. 1 GG geschützten Pressefreiheit der Beklagten eingeräumt.

10 1. Die Zulässigkeit von Bildveröffentlichungen ist nach der gefestigten

Rechtsprechung des erkennenden Senats nach dem abgestuften Schutzkonzept der §§ 22, 23 KUG zu beurteilen (grundlegend Senatsurteil vom 6. März 2007 - VI ZR 51/06, BGHZ 171, 275 Rn. 9 ff.; vgl. hiernach etwa Senatsurteile vom 10. März 2009 - VI ZR 261/07, BGHZ 180, 114 Rn. 9; vom 18. Oktober 2011 - VI ZR 5/10, VersR 2012, 116 Rn. 8 f.; vom 22. November 2011 - VI ZR 26/11, VersR 2012, 192 Rn. 23 f.; vom 28. Mai 2013 - VI ZR 125/12, VersR 2013, 1178 Rn. 10; vom 21. April 2015 - VI ZR 245/14, VersR 2015, 898 Rn. 14; jeweils mwN), das sowohl mit verfassungsrechtlichen Vorgaben (vgl. BVerfGE 120, 180, 210) als auch mit der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte im Einklang steht (vgl. EGMR, NJW 2012, 1053 Rn. 114 ff.). Danach dürfen Bildnisse einer Person grundsätzlich nur mit deren Einwilligung verbreitet werden (§ 22 Satz 1 KUG). Die Veröffentlichung des Bildes einer Person begründet grundsätzlich eine rechtfertigungsbedürftige Beschränkung ihres allgemeinen Persönlichkeitsrechts (BVerfG, NJW 2011, 740 Rn. 52 mwN). Die nicht von der Einwilligung des Abgebildeten gedeckte Verbreitung seines Bildes ist nur zulässig, wenn dieses Bild dem Bereich der Zeitgeschichte oder einem der weiteren Ausnahmetatbestände des §

23 Abs. 1 KUG positiv zuzuordnen ist und berechnigte Interessen des Abgebildeten nicht verletzt werden (§ 23 Abs. 2 KUG). Dabei ist schon bei der Beurteilung, ob ein Bild dem Bereich der Zeitgeschichte zuzuordnen ist, eine Abwägung zwischen den Rechten des Abgebildeten aus Art. 2 Abs. 1 i.V.m. Art. 1 Abs. 1 GG, Art. 8 Abs. 1 EMRK einerseits und den Rechten der Presse aus Art. 5 Abs. 1 GG, Art. 10 EMRK andererseits vorzunehmen (Senatsurteile vom 27. September 2016 - VI ZR 310/14, NJW 2017, 804 Rn. 5; vom 21. April 2015 - VI ZR 245/14, VersR 2015, 898 Rn. 14; vom 19. Juni 2007 - VI ZR 12/06, VersR 2007, 1135 Rn. 17).

11 2. Nach den Feststellungen des Berufungsgerichts hat der Kläger in die Veröffentlichung der Fotos nicht eingewilligt (§ 22 Satz 1 KUG). Die beanstandeten Aufnahmen dienen jedoch der Bebilderung einer Berichterstattung über ein Ereignis der Zeitgeschichte und sind damit selbst Bildnisse aus dem Bereich der Zeitgeschichte (§ 23 Abs. 1 Nr. 1 KUG).

12 a) Maßgebend für die Frage, ob es sich um ein Bildnis aus dem Bereich der Zeitgeschichte handelt, ist der Begriff des Zeitgeschehens. Der Begriff des Zeitgeschehens darf nicht zu eng verstanden werden. Im Hinblick auf den

Informationsbedarf der Öffentlichkeit umfasst er nicht nur Vorgänge von historisch-politischer Bedeutung, sondern ganz allgemein das Geschehen der Zeit, also alle Fragen von allgemeinem gesellschaftlichem Interesse. Er wird mithin vom Interesse der Öffentlichkeit bestimmt.

13 Es gehört zum Kern der Presse- und Meinungsfreiheit, dass die Medien im Grundsatz nach ihren eigenen publizistischen Kriterien entscheiden können, was sie des öffentlichen Interesses für wert halten und was nicht (vgl. Senatsurteile vom 22. November 2011 - VI ZR 26/11, VersR 2012, 192 Rn. 19; vom 26. Oktober 2010 - VI ZR 230/08, BGHZ 187, 200 Rn. 20; vom 10. März 2009 - VI ZR 261/07, BGHZ 180, 114 Rn. 11; vom 1. Juli 2008 - VI ZR 67/08, VersR 2008, 1411 Rn. 14; BVerfGE 120, 180, 197; BVerfGE 101, 361, 389; jeweils mwN). Auch unterhaltende Beiträge, etwa über das Privat- und Alltagsleben prominenter Personen, nehmen grundsätzlich an diesem Schutz teil (vgl. Senatsurteile vom 22. November 2011 - VI ZR 26/11, VersR 2012, 192 Rn. 19; vom 26. Oktober 2010 - VI ZR 230/08, BGHZ 187, 200 Rn. 20; vom 10. März 2009 - VI ZR 261/07, BGHZ 180, 114 Rn. 11; vom 14. Oktober 2008 - VI ZR 272/06, VersR 2009, 78 Rn. 14; vom 9. Dezember 2003 - VI ZR 373/02, NJW 2004,

762, 764; BVerfGE 120, 180, 197, 205; 101, 361, 389 ff.), ohne dass dieser von der Eigenart oder dem Niveau des jeweiligen Beitrags oder des Presseerzeugnisses abhängt (vgl. Senatsurteile vom 28. Mai 2013 - VI ZR 125/12, NJW 2013, 2890 Rn. 17; vom 10. März 2009 - VI ZR 261/07, BGHZ 180, 114 Rn. 11, 14; vom 6. März 2007 - VI ZR 51/06, BGHZ 171, 275 Rn. 32; jeweils mwN). Gerade prominente Personen können der Allgemeinheit Möglichkeiten der Orientierung bei eigenen Lebensentwürfen bieten sowie Leit- bild- und Kontrastfunktionen erfüllen. Auch Aspekte aus ihrem Privatleben wie beispielsweise die Normalität ihres Alltagslebens können der Meinungsbildung zu Fragen von allgemeinem Interesse dienen (Senatsurteile vom 2. Mai 2017 - VI ZR 262/16, AfP 2017, 310 Rn. 24; vom 10. März 2009 - VI ZR 261/07, BGHZ 180, 114 Rn. 11; vom 28. Oktober 2008 - VI ZR 307/07, BGHZ 178, 213 Rn. 13; BVerfG, NJW 2017, 1376 Rn. 15; BVerfGE 120, 180, 204; BVerfGE 101, 361, 390).

14 Im Rahmen einer zulässigen Berichterstattung steht es den Medien demnach grundsätzlich frei, Textberichte durch Bilder zu illustrieren (Senatsurteil vom 28. Oktober 2008 - VI ZR 307/07, BGHZ 178, 213 Rn. 15). Es ist Sache der Medien, über Art und

Weise der Berichterstattung und ihre Aufmachung zu entscheiden. Sie haben das Recht, Art und Ausrichtung, Inhalt und Form eines Publikationsorgans frei zu bestimmen (Senatsurteil vom 28. Mai 2013 - VI ZR 125/12, NJW 2013, 2890 Rn. 15 und 17; BVerfGE 101, 361, 389). Eine Bedürfnisprüfung, ob eine Bebilderung veranlasst war, findet nicht statt. Bildaussagen nehmen am verfassungsrechtlichen Schutz des Berichtsteils, dessen Bebilderung sie dienen (Senatsurteil vom 28. Oktober 2008 - VI ZR 307/07, BGHZ 178, 213 Rn. 15; BVerfGE 120, 180, 196).

15 b) Ein Informationsinteresse besteht jedoch nicht schrankenlos, vielmehr wird der Einbruch in die persönliche Sphäre des Abgebildeten durch den Grundsatz der Verhältnismäßigkeit begrenzt (Senatsurteile vom 27. September 2016 - VI ZR 310/14, NJW 2017, 804 Rn. 7; vom 11. Juni 2013 - VI ZR 209/12, VersR 2013, 1272 Rn. 9; vom 22. November 2011 - VI ZR 26/11, VersR 2012, 192 Rn. 24; jeweils mwN). Nicht alles, wofür sich Menschen aus Langeweile, Neugier und Sensationslust interessieren, rechtfertigt dessen visuelle Darstellung in der breiten Medienöffentlichkeit. Wo konkret die Grenze für das berechnigte Informationsinteresse der Öffentlichkeit an der aktuellen Berichterstattung zu ziehen ist, lässt

sich nur unter Berücksichtigung der jeweiligen Umstände des Einzelfalls entscheiden (Senatsurteil vom 28. Oktober 2008 - VI ZR 307/07, BGHZ 178, 213 Rn. 14).

16 c) Es bedarf mithin einer abwägenden Berücksichtigung der kollidierenden Rechtspositionen (vgl. Senatsurteile vom 13. April 2010 - VI ZR 125/08, AfP 2010, 259 Rn. 14; vom 1. Juli 2008 - VI ZR 243/06, AfP 2008, 507 Rn. 20; BVerfGE 120, 180, 205). Die Belange der Medien sind dabei in einen möglichst schonenden Ausgleich mit dem allgemeinen Persönlichkeitsrecht des von einer Berichterstattung Betroffenen zu bringen (Senatsurteil vom 27. September 2016 - VI ZR 310/14, NJW 2017, 804 Rn. 8).

17 aa) Im Rahmen der Abwägung ist von maßgeblicher Bedeutung, ob die Medien im konkreten Fall eine Angelegenheit von öffentlichem Interesse ernsthaft und sachbezogen erörtern, damit den Informationsanspruch des Publikums erfüllen und zur Bildung der öffentlichen Meinung beitragen oder ob sie lediglich die Neugier der Leser nach privaten Angelegenheiten prominenter Personen befriedigen (vgl. Senatsurteile vom 22. November 2011 - VI ZR 26/11, VersR 2012, 192 Rn. 25; vom 10. März 2009 - VI ZR 261/07, BGHZ

180, 114 Rn. 12; vom 14. Oktober 2008 - VI ZR 272/06, VersR 2009, 78 Rn. 15; BVerfGE 101, 361, 391; BVerfGE 120, 180, 205; EGMR, NJW 2012, 1053 Rn. 108 ff.; 1058 Rn. 89 ff.). Je größer der Informationswert für die Öffentlichkeit ist, desto mehr muss das Schutzinteresse desjenigen, über den informiert wird, hinter den Informationsbelangen der Öffentlichkeit zurücktreten. Umgekehrt wiegt aber auch der Schutz der Persönlichkeit des Betroffenen umso schwerer, je geringer der Informationswert für die Allgemeinheit ist (Senatsurteile vom 26. Oktober 2010 - VI ZR 230/08, BGHZ 187, 200 Rn. 10; vom 6. März 2007 - VI ZR 51/06, BGHZ 171, 275 Rn. 20).

18 Der Informationsgehalt einer Bildberichterstattung ist im Gesamtkontext, in den das Personenbildnis gestellt ist, zu ermitteln, insbesondere unter Berücksichtigung der zugehörigen Textberichterstattung. Daneben sind für die Gewichtung der Belange des Persönlichkeitsschutzes der Anlass der Berichterstattung und die Umstände in die Beurteilung mit einzubeziehen, unter denen die Aufnahme entstanden ist. Auch ist bedeutsam, in welcher Situation der Betroffene erfasst und wie er dargestellt wird (Senatsurteil vom 27. September 2016 - VI ZR 310/14, NJW 2017, 804 Rn. 8; vgl. Senatsurteile vom

28. Mai 2013 - VI ZR 125/12, VersR 2013, 1178 Rn. 13; vom 22. November 2011 - VI ZR 26/11, VersR 2012, 192 Rn. 26).

19 bb) Bei der Prüfung der Frage, ob und in welchem Ausmaß die Berichterstattung einen Beitrag zur öffentlichen Meinungsbildung leistet und welcher Informationswert ihr damit beizumessen ist, ist von erheblicher Bedeutung, welche Rolle dem Betroffenen in der Öffentlichkeit zukommt. Der Europäische Gerichtshof für Menschenrechte unterscheidet zwischen Politikern ("politicians/ personnes politiques"), sonstigen im öffentlichen Leben oder im Blickpunkt der Öffentlichkeit stehenden Personen ("public figures/personnes publiques") und Privatpersonen ("ordinary person/personne ordinaire"), wobei einer Berichterstattung über letztere enger Grenzen als in Bezug auf den Kreis sonstiger Personen des öffentlichen Lebens gezogen seien und der Schutz der Politiker am schwächsten sei (vgl. EGMR, NJW 2015, 1501 Rn. 54; EGMR, Urteil vom 30. März 2010, Beschwerde-Nr. 20928/05, BeckRS 2012, 18730 Rn. 55). Er erkennt ein gesteigertes Informationsinteresse der Öffentlichkeit hinsichtlich politischer Akteure an, wobei nicht nur die Amtsführung, sondern unter besonderen Umständen im Hinblick auf die Rolle der

Presse als "Wachhund der Öffentlichkeit" auch Aspekte des Privatlebens betroffen sein können (vgl. EGMR, NJW 2012, 1053 Rn. 110; NJW 2010, 751 Rn. 44 ff.; NJW 2004, 2647 Rn. 63). Auch der Senat hat für Personen des politischen Lebens ein gesteigertes Informationsinteresse des Publikums unter dem Gesichtspunkt demokratischer Transparenz und Kontrolle stets als legitim anerkannt, weshalb eine Berichterstattung über die Normalität ihres Alltagslebens oder über Umstände der privaten Lebensführung durch das Informationsinteresse der Öffentlichkeit gerechtfertigt sein kann (vgl. Senatsurteil vom 24. Juni 2008 - VI ZR 156/06, BGHZ 177, 119 Rn. 17 unter Verweis auf BVerfGE 101, 361, 390).

20 cc) Stets abwägungsrelevant ist die Intensität des Eingriffs in das allgemeine Persönlichkeitsrecht (vgl. BVerfGE 120, 180, 209).

21 d) Nach diesen Grundsätzen ist der vorliegende Eingriff in das allgemeine Persönlichkeitsrecht des Klägers in seiner Ausprägung als Recht am eigenen Bild durch das Informationsinteresse der Öffentlichkeit gerechtfertigt.

22 aa) Der Kläger war von Juni 2010 bis Februar 2012 Bundespräsident und damit Staatsoberhaupt der Bundesrepublik Deutschland (zur

Stellung des Bundespräsidenten als Staatsoberhaupt und den damit verbundenen verfassungsrechtlichen Befugnissen im Überblick statt aller Herzog, in: Maunz/Dürig, GG, Lfg. 54 Januar 2009, Art. 54 Rn. 2 ff.). Als Inhaber des höchsten Staatsamtes war er in besonderer herausgehobener Weise politische Person im Sinne der o.g. Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte, weshalb das öffentliche Interesse an seiner Person in besonderer Weise als grundsätzlich gerechtfertigt anzusehen ist (vgl. Senatsurteil vom 24. Juni 2008 - VI ZR 156/06, BGHZ 177, 119 Rn. 15).

23 Die politische Bedeutung des Klägers und die Berechtigung des öffentlichen Interesses an seiner Person endeten auch nicht mit dem Rücktritt des Klägers vom Amt des Bundespräsidenten im Februar 2012; die besondere Bedeutung des Amtes wirkt vielmehr nach. Es besteht ein berechtigtes Interesse der Öffentlichkeit, darüber informiert zu werden, wie ein hochrangiger Politiker sein Leben nach dem Abschied aus der aktiven Politik gestaltet. Ein Politiker ist daher auch nach seinem Ausscheiden aus der Politik nicht wie jedwede Privatperson zu behandeln, sondern bleibt - jedenfalls für eine Übergangszeit - trotz des Amtsverlustes politische Person in o.g. Sinne, die

Leitbild- oder Kontrastfunktion erfüllen kann und deren Verhalten weiterhin Gegenstand öffentlicher Diskussionen sein darf (vgl. Senatsurteile vom 19. Mai 2009 - VI ZR 160/08, VersR 2009, 1241 Rn. 14 f.; vom 24. Juni 2008 - VI ZR 156/06, BGHZ 177, 119 Rn. 21). Dies gilt in besonderer Weise für einen ehemaligen Bundespräsidenten, dessen politisches und gesellschaftliches Engagement regelmäßig nicht mit dem Ausscheiden aus dem Amt endet. So liegt der Fall auch hier. Der Kläger selbst weist - allgemeinbekannt - auf seiner Website auf seine vielfältigen öffentlichen Verpflichtungen als "Altbundespräsident" bis hin zur Vertretung Deutschlands bei auswärtigen Veranstaltungen hin (<http://christianwulff.de/was-macht-eigentlich-ein-altbundespraesident/>, zuletzt abgerufen am 6. Februar 2018). Die fortdauernd große politische Bedeutung des Klägers wird gespiegelt durch die besondere Form seiner nachamtlichen Versorgung. Dies gilt für die lebenslange Alimentierung durch Zahlung eines Ehrensoldes in voller Höhe der Amtsbezüge (§ 1 BPräsRuhebezG), mehr noch aber für die zeitlich unbegrenzte Übernahme von Repräsentationskosten durch die Bereitstellung von Sach- und Personalmitteln für einen Dienstwagen mit Fahrer und ein ausgestattetes Büro

mit Schreibkraft und Referenten (vgl. BT-Drs.17/13660 S. 16 f. - Bericht des Petitionsausschusses; heute im Bundestag [hib] 311/2017 vom 17. Mai 2017, Ruhebezüge des Bundespräsidenten - Beschlussempfehlung des Petitionsausschusses; zu Umfang, Art und Begründung der nachamtlichen Versorgung des Bundespräsidenten im Allgemeinen Aßmann, Die Besoldung und Versorgung des Bundespräsidenten, 2014, S. 16 ff.; zum Rücktritt des Klägers im Besonderen Pieper, in: BeckOK GG, Stand 1. Juni 2017, Art. 54 Rn. 31.1 ff., jeweils mwN).

24 bb) Die - nicht angegriffene - jeweils zugehörige Textberichterstattung leistet einen Beitrag zu einer Diskussion allgemeinen Interesses. Sie nimmt die Versöhnung des Klägers mit seiner Ehefrau in Bezug und macht deren eheliche Rollenverteilung zu ihrem Gegenstand. Angesichts der politischen Bedeutung der vom Kläger ausgeübten Staatsämter sowie der im Verlauf seiner politischen Karriere und darüber hinaus von ihm und seiner Frau immer wieder gewährten tiefen Einblicke in ihr Eheleben - das Berufungsgericht spricht insofern wieder- holt von "medialer Inszenierung" - hatte die Versöhnung des Ehepaares Nachrichten- und Informationswert und war damit unter Berücksichtigung des weiten, die Reichweite

der Pressefreiheit angemessen berücksichtigenden Begriffsverständnisses ein zeitgeschichtliches Ereignis. Der Kläger selbst hat diesem Nachrichten- und Informationswert mit Pressemitteilung vom 6. Mai 2015 Rechnung getragen.

25 Der Bezug hierzu ist offensichtlich für den Text des - nur eine Woche später und damit in der nächsten Ausgabe erschienenen - PEOPLE-Artikels vom 13. Mai 2015. Die Beklagte zitiert hierin aus der Pressemitteilung des Rechtsanwalts des Klägers und rekapituliert knapp, jedoch ernsthaft und sachbezogen den Verlauf der Beziehung des Klägers zu seiner Ehefrau. Aber auch die Textberichterstattung in dem NEUE POST-Artikel vom 20. Mai 2015 weist einen hinreichenden aktuellen Bezug zum Versöhnungsereignis auf. Auch in diesem Artikel knüpft die Beklagte an die "überraschende Versöhnung der beiden vor wenigen Tagen" an, um diesen eher abstrakten Umstand im Folgenden für ihre Leserschaft anschaulich zu machen durch eine Erörterung der damit verbundenen Alltagspflichten wie der Erledigung des Großeinkaufs der Familie.

26 Die streitgegenständlichen Fotos bebildern diese Berichterstattung und nehmen auf diese Weise an deren

Ereignisbezug teil. Sie besitzen einen eigenen Aussagegehalt, indem sie den Kläger und seine Ehefrau gemeinsam am Auto (Auto-Foto) und den Kläger beim Schieben eines gefüllten Einkaufswagens (Einkaufswagen-Foto) zeigen. Damit machen sie die praktischen Konsequenzen der Versöhnungsnachricht sichtbar und dienen zugleich als deren Beleg. Sie sind kontextgerecht, ergänzen und veranschaulichen den jeweiligen Wortbeitrag. Unter diesen Umständen musste sich die Beklagte auch nicht auf die Verwendung eines genehmigten oder genehmigungsfrei verwendbaren Fotos verweisen lassen (vgl. hierzu Senatsurteil vom 17. Februar 2009 - VI ZR 75/08, VersR 2009, 841 Rn. 17).

27 cc) Der Kläger hat sein Ehe- und Familienleben in der Vergangenheit immer wieder intensiv öffentlich thematisiert und sich dadurch mit einer öffentlichen Erörterung dieses Themas einverstanden gezeigt. Diese Selbstöffnung wirkt fort, nachdem der Kläger und seine Frau ihre Ehe auch nach dem Rücktritt des Klägers vom Amt des Bundespräsidenten nicht situationsübergreifend und konsistent verschlossen haben (vgl. Senatsurteil vom 14. Oktober 2008 - VI ZR 272/06, NJW 2009, 754 Rn. 23).

28 dd) Entgegen der Auffassung des Berufungsgerichts betrifft die streitgegenständliche Bildberichterstattung den Kläger lediglich in seiner Sozialsphäre.

Die Fotos sind zur Einkaufszeit auf dem Parkplatz eines Supermarktes und damit im öffentlichen Raum entstanden (vgl. BVerfG, NJW 2017, 1376 Rn. 19). Auch im Zusammenhang mit der zugehörigen Textberichterstattung beruhen die Beiträge ausschließlich auf Wahrnehmungen, die typischerweise durch die Öffentlichkeit des Orts ermöglicht wurden und keine indiskrete Beobachtung im Einzelnen voraussetzen (vgl. hierzu BVerfG, NJW 2000, 2194, 2195). Zwar ist Privatsphäre nicht allein räumlich zu verstehen. Privatheit und die daraus abzuleitende berechnete Erwartung, nicht in den Medien abgebildet zu werden, erfordern nicht notwendig eine durch räumliche Abgeschlossenheit geprägte Situation, sondern können in Momenten der Entspannung oder des Sich-Gehens außerhalb der Einbindung in die Pflichten des Berufs und des Alltags auch außerhalb örtlicher Abgeschlossenheit entstehen (vgl. Senatsurteile vom 14. Oktober 2008 - VI ZR 272/06, NJW 2009, 754 Rn. 17; vom 1. Juli 2008 - VI ZR 243/06, VersR 2008, 1411 Rn. 24). Die streitgegenständlichen Fotos zeigen den Kläger

jedoch gerade nicht in einem Moment der Entspannung oder des Sich-Gehen-Lassens außerhalb der Einbindung in die Pflichten des Alltags, sondern in Erfüllung derselben, nämlich bei Erledigung des Wocheneinkaufs.

29 3. Bei dieser Sachlage und der gebotenen Würdigung der Berichterstattung in ihrer Gesamtheit (vgl. Senatsurteil vom 6. März 2007 - VI ZR 51/06, BGHZ 171, 275 Rn. 33) kommt den einer Veröffentlichung der Abbildungen entgegenstehenden berechtigten Interessen des Klägers kein überwiegendes Gewicht zu (§ 23 Abs. 2 KUG).

30 a) Die Fotos selbst weisen keinen eigenständigen Verletzungsgehalt auf. Die Aufnahmen würdigen den Kläger nicht herab, sondern zeigen ihn in unverfänglichen Alltagssituationen. Dies gilt ohne weiteres für das Autofoto, auf dem nur der Kopf des Klägers zu sehen ist, während der Rest seines Körpers vom Auto verdeckt wird. Dies gilt aber auch für das Einkaufswagen-Foto, das den Kläger in gepflegter Alltagskleidung hinter seinem Einkaufswagen und damit in der sympathischen Rolle eines fürsorgenden Familienvaters zeigt.

31 Auch die mit dem Einkaufswagen-Foto übermittelte Information über

die vom Kläger erworbenen Produkte führt nach den Umständen des Streitfalls zu keinem anderen Ergebnis. Zwar kann auch die Berichterstattung über Art und Anzahl von ihm erworbener Alltagsprodukte die Privatsphäre eines Betroffenen berühren, was etwa für Artikel aus dem Bereich der Körper- und Gesundheitspflege keiner näheren Erläuterung bedarf. Doch sind auf dem angegriffenen Foto keine derartigen Produkte erkennbar. Soweit sich auf dem Foto überhaupt einzelne Produkte identifizieren lassen, sind diese im Übrigen in der zugehörigen - nicht angegriffenen - Textberichterstattung ausdrücklich benannt ("Mineralwasser, Baguette-Brot, Salat, Schokoküsse"), so dass der Abbildung keine zusätzliche Information zu entnehmen ist.

32 Soweit der Kläger auf die dem Einkaufswagen-Foto zugehörige Bildunterschrift ("Hab den Wagen vollgeladen ... Christian Wulff beim Großeinkauf") abstellt und darin eine ihm abträgliche Anspielung auf das gleichlautend beginnende Volkslied ("Hab den Wagen vollgeladen / Voll mit alten Weibsen") sieht, kann dem schon deshalb keine maßgebliche Bedeutung zukommen, weil die Textberichterstattung - und damit auch die genannte Bildunterschrift - vom Kläger nicht beanstandet wurde. Dies gilt entsprechend

für den weiteren Inhalt des vom Kläger als gehässig empfundenen NEUE POST-Artikels.

- 28 O 379/15 –

OLG Köln, Entscheidung vom
19.01.2017 - 15 U 88 –

33 b) Dies alles wird durch die zu Gunsten des Klägers zu berücksichtigenden Umstände wie insbesondere die Feststellung des Berufungsgerichts, dass die Fotos nicht zufällig entstanden sind, sondern von einem "Paparazzo" geschossen wurden, nicht aufgewogen. Dies gilt zumal die Fotos nach den insoweit nicht angegriffenen weiteren Feststellungen des Berufungsgerichts weder heimlich aufgenommen noch der Kläger oder seine Frau durch die konkrete Aufnahmesituation besonders belästigt wurden.

III.

34 Da keine weiteren Feststellungen mehr zu treffen sind, hat der Senat in der Sache selbst zu entscheiden (§ 563 Abs. 3 ZPO).

Galke

Wellner

von Pentz

Oehler

Klein

Vorinstanzen: 

LG Köln, Entscheidung vom 27.04.2016