EFiled: Dec 07 2020 04:18PM EST
Filing ID 66165642
Case Number 305,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN G. PERLMAN; REARDEN LLC, a California limited liability company; and ARTEMIS NETWORKS LLC, a Delaware limited liability company, Appellants, v. VOX MEDIA, INC., a Delaware corporation, Appellee.	C.A. No. 305, 2020 Courts Below: Superior Court of the State of Delaware, New Castle County, C.A. No. N19C-07-235 PRW-CCLD Court of Chancery of the State of Delaware, C.A. No. 10046-VCS

MOTION OF REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 40 MEDIA ORGANIZATIONS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPELLEE AND AFFIRMANCE

Katie Townsend
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St., NW, Suite 1020
Washington, D.C. 20005
Telephone: (202) 795-9303
Facsimile: (202) 795-9310

David L. Finger (DE Bar #2556)
FINGER & SLANINA, LLC
One Commerce Center
1201 N. Orange St., 7th fl.
Wilmington, DE 19801
(302) 573-2525
dfinger@delawgroup.com
Attorney for Amici Curiae

Pursuant to Supreme Court Rule 28, the Reporters Committee for Freedom of the Press ("Reporters Committee") and 40 media organizations (collectively, "amici") move this Court for leave to file the attached *amici curiae* brief in support of Appellee and affirmance. *Amici* are news media organizations and groups dedicated to defending the First Amendment and newsgathering rights of the press.

I. Movants' Interest

The Reporters Committee is an unincorporated nonprofit association that was founded by leading journalists and media lawyers in 1970 to combat an unprecedented wave of government subpoenas seeking the names of confidential sources. Today, its attorneys provide pro bono legal representation and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee frequently serves as *amicus curiae* in cases that present legal issues of importance to journalists and news organizations in state and federal courts around the country, including cases involving defamation suits against journalists. The other *amici* are news media organizations and groups dedicated to defending the First Amendment and newsgathering rights of the press.

As members and representatives of the news media, *amici* have a strong interest in ensuring that journalists and news organizations can report on matters of public concern without fear of defamation liability. The issues presented in this lawsuit have potentially broad ramifications for *amici*, who publish content in a

variety of media, including online, reaching millions of people every day. The single-publication rule, which prevents every copy of a newspaper or every click on a website from giving rise to a separate cause of action, protects journalists and news outlets from the threat of endless defamation litigation. It also ensures that when journalists publish online, they can include hyperlinks—which connect readers to additional information—without those links leading to liability.

II. Relevance of Brief to Disposition of the Case

The *amici* brief adds to those of the parties by providing a deeper analysis of the application of the single-publication rule, and the republication exception to that rule, in the context of online publishing. The amici brief details the history and purpose of the single-publication rule and marshals additional modern caselaw from a broad range of jurisdictions applying the rule to internet publications. The *amici* brief also explains the strong public policy reasons that the use of hyperlinks in online journalism should be encouraged, not deterred.

Applying these principles here, the *amici* brief argues that the hyperlink at issue in this case should not constitute republication. This analysis is directly relevant to the disposition of this case. Once the hyperlink in the 2014 article is properly understood as not republishing the 2012 articles, Appellants' claims based on the 2012 articles are time-barred and therefore must be rejected.

III. Consent of the Parties

Counsel for Appellants Stephen G. Perlman, Rearden LLC, and Artemis Networks LLC opposes the filing of the amici brief. Counsel for Appellee Vox Media consents to the filing of the amici brief. Finally, proposed amici have timely submitted this motion and the accompanying amici brief pursuant to Supreme Court Rule 28(e).

CONCLUSION

WHEREFORE, for the above reasons, proposed amici respectfully request that this Court grant them leave to file an amici curiae brief (filed herewith) in this matter.

Respectfully submitted,

/s/ David L. Finger
David L. Finger (DE Bar #2556)
FINGER & SLANINA, LLC
One Commerce Center
1201 N. Orange St., 7th fl.
Wilmington, DE 19801
(302) 573-2525
dfinger@delawgroup.com
Attorney for Amici Curiae

OF COUNSEL:

Katie Townsend
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS
1156 15th St., NW, Suite 1020
Washington, D.C. 20005
Telephone: (202) 795-9303
Facsimile: (202) 795-9310

Dated: Dec. 7, 2020

EFiled: Dec 07 2020 04:18PM EST
Filing ID 66165642
Case Number 305,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN G. PERLMAN; REARDEN LLC, a California limited liability company; and ARTEMIS NETWORKS LLC, a Delaware limited liability company, Appellants, v. VOX MEDIA, INC., a Delaware corporation, Appellee.	C.A. No. 305, 2020 Courts Below: Superior Court of the State of Delaware, New Castle County, C.A. No. N19C-07-235 PRW-CCLD Court of Chancery of the State of Delaware, C.A. No. 10046-VCS

[PROPOSED] ORDER GRANTING MOTION OF REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 40 MEDIA ORGANIZATIONS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPELLEE AND AFFIRMANCE

On this ___ day of _____, 2020, IT IS HEREBY ORDERED THAT:

1. The motion of the Reporters Committee for Freedom of the Press and 40 Media Organizations for Leave to File Brief as Amici Curiae in Support of Appellee and Affirmance (the "Motion") is GRANTED.

2. The brief of the Reporters Committee for Freedom of the Press and 40 media organizations attached to its Motion is accepted for filing. The filing date for the brief is December 7, 2020.

SO ORDERED

_____
Justice

EFiled: Dec 07 2020 04:18PM EST
Filing ID 66165642
Case Number 305,2020

SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN G. PERLMAN; REARDEN LLC, a California limited liability company; and ARTEMIS NETWORKS LLC, a Delaware limited liability company, Appellants, v. VOX MEDIA, INC., a Delaware corporation, Appellee.	C.A. No. 305, 2020 Courts Below: Superior Court of the State of Delaware, New Castle County, C.A. No. N19C-07-235 PRW-CCLD Court of Chancery of the State of Delaware, C.A. No. 10046-VCS

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This motion complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft® Word for Mac, Version 16.43.

2. This motion complies with the type-volume limitation of Rule 30(d) because it contains 535 words, which were counted by Microsoft® Word for Mac, Version 16.43.

Respectfully submitted,

_____

David L. Finger (DE Bar #2556)
Finger & Slanina, LLC
One Commerce Center
1201 N. Orange St., 7th fl.
Wilmington, DE 19801
(302) 573-2525
dfinger@delawgroup.com
Attorney for Amici Curiae

Dated: Dec. 7, 2020

EFiled: Dec 07 2020 04:18PM EST
Filing ID 66165642
Case Number 305,2020

Exhibit 1

EFiled: Dec 07 2020 04:18PM EST
Filing ID 66165642
Case Number 305,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN G. PERLMAN; REARDEN LLC, a California limited liability company; and ARTEMIS NETWORKS LLC, a Delaware limited liability company, Appellants, v. VOX MEDIA, INC., a Delaware corporation, Appellee.	C.A. No. 305, 2020 Courts Below: Superior Court of the State of Delaware, New Castle County, C.A. No. N19C-07-235 PRW-CCLD Court of Chancery of the State of Delaware, C.A. No. 10046-VCS

BRIEF OF *AMICI CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 40 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLEE AND AFFIRMANCE

OF COUNSEL:

Katie Townsend
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
1156 15th St., NW, Suite 1020
Washington, D.C. 20005
Telephone: (202) 795-9303
Facsimile: (202) 795-9310

David L. Finger (DE Bar #2556)
FINGER & SLANINA, LLC
One Commerce Center
1201 N. Orange St., 7th fl.
Wilmington, DE 19801
(302) 573-2525
dfinger@delawgroup.com
Attorney for Amici Curiae

Dated: December 7, 2020

TABLE OF CONTENTS

IDENTITY AND INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Under the single-publication rule, Appellants' defamation claims based on the 2012 articles are time-barred. 5

A. The single-publication rule applies to internet publishing. 6

B. The republication exception to the single-publication rule does not apply to the hyperlink and reference in the 2014 article. 10

II. A republication rule that deters hyperlinking would deprive internet users and publishers of an essential tool for understanding information online. ... 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Belli v. Roberts Bros. Furs, 49 Cal. Rptr. 625 (Dist. Ct. App. 1966).....8

Christoff v. Nestle USA, Inc., 62 Cal. Rptr. 3d 122 (Ct. App. 2007), *aff'd in part, rev'd in part*, 213 P.3d 132 (Cal. 2009).....11

Churchill v. State, 876 A.2d 311 (N.J. Super. Ct. App. Div. 2005) 13, 14

Clark v. Viacom Int'l Inc., 617 Fed. App'x 495 (6th Cir. 2015) 11, 13

Firth v. State, 775 N.E.2d 463 (N.Y. 2002)..... 8, 9, 11, 18

In re Phila. Newspapers, *LLC*, 690 F.3d 161 (3d Cir. 2012) 15

Jankovic v. Int'l Crisis Grp., 494 F.3d 1080 (D.C. Cir. 2007).....11

Lokhova v. Halper, 441 F. Supp. 3d 238 (E.D. Va. Feb. 27, 2020), *appeal docketed*, No. 20-1437 (4th Cir. Mar. 30, 2020) 12

Nunes v. Lizza, 2020 WL 5504005 (N.D. Iowa Sept. 11, 2020) 12

Penrose Hill, Ltd. v. Mabray, 2020 WL 4804965 (N.D. Cal. Aug. 18, 2020).....12

Pippen v. NBCUniversal Media, LLC, 734 F.3d 610 (7th Cir. 2013) 11

Roberts v. McAfee, Inc., 660 F.3d 1156 (9th Cir. 2011)..... 9, 11

Salyer v. S. Poverty Law Ctr., Inc., 701 F. Supp. 2d 912 (W.D. Ky. 2009).....14

Shively v. Bozanich, 80 P.3d 676 (Cal. 2003)..... 6, 7, 8

Sundance Image Tech., Inc. v. Cone Editions Press, Ltd., 2007 WL 935703 (S.D. Cal. Mar. 7, 2007) 9, 13

Taylor v. Kuwatch, 2004 WL 1463046 (Cal. Ct. App. June 30, 2004) 9

The Duke of Brunswick v. Harmer (Q.B.1849) 117 Eng. Rep. 75 7

Traditional Cat Ass'n, Inc. v. Gilbreath, 13 Cal. Rptr. 3d 353 (Ct. App. 2004).....9

Yeager v. Bowlin, 693 F.3d 1076 (9th Cir. 2012)..... 9, 11

STATUTES

Cal. Civ. Code § 3425.3 8

OTHER AUTHORITIES

Felix Salmon, *Why Journalists Need to Link*, Reuters (Feb. 27, 2012), https://perma.cc/C76N-X4VX 18

Jonathan Stray, *Why Link Out? Four Journalistic Purposes of the Noble Hyperlink*, Nieman Lab (June 8, 2010), https://perma.cc/EC7X-F7K3 16

Michael Schudson & Katherine Fink, *Link Think*, Colum. Journalism Rev. (Mar./Apr. 2012), https://perma.cc/Q3CF-BMG2.....17

Restatement (Second) of Torts (Am. Law Inst. 1977).....8

Robert Niles, *When to Hyperlink Within an Online News Story?*, Online Journalism Rev. (Apr. 11, 2011), https://perma.cc/7W56-HAAF 17

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are the Reporters Committee for Freedom of the Press ("Reporters Committee"), The Associated Press, The Atlantic Monthly Group LLC, Boston Globe Media Partners, LLC, BuzzFeed, California News Publishers Association, The Center for Investigative Reporting (d/b/a Reveal), Courthouse News Service, The Daily Beast Company LLC, Dow Jones & Company, Inc., The E.W. Scripps Company, Gannett Co., Inc., Investigative Reporting Workshop at American University, Los Angeles Times Communications LLC, Maryland-Delaware-D.C. Press Association, The McClatchy Company, LLC, The Media Institute, MediaNews Group Inc., Meredith Corporation, as publisher of PEOPLE magazine and People.com, MPA - The Association of Magazine Media, National Association of Black Journalists, National Journal Group LLC, National Newspaper Association, National Press Club Journalism Institute, The National Press Club, National Press Photographers Association, The New York Times Company, The News Leaders Association, News Media Alliance, NYP Holdings, Inc., Online News Association, The Philadelphia Inquirer, POLITICO LLC, Radio Television Digital News Association, The Seattle Times Company, Society of Environmental Journalists, Society of Professional Journalists, TIME USA, LLC, Tully Center for Free Speech, Verizon Media, and The Washington Post.

Lead *amicus* the Reporters Committee is an unincorporated nonprofit association that was founded by leading journalists and media lawyers in 1970 to combat an unprecedented wave of government subpoenas seeking the names of confidential sources. Today, its attorneys provide pro bono legal representation and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee frequently serves as *amicus curiae* in cases that present legal issues of importance to journalists and news organizations in state and federal courts around the country, including cases involving defamation suits against journalists. The other *amici* are news media organizations and groups dedicated to defending the First Amendment and newsgathering rights of the press.

As members and representatives of the news media, *amici* have a strong interest in ensuring that journalists and news organizations can report on matters of public concern without fear of defamation liability. The issues presented in this lawsuit have potentially broad ramifications for *amici*, who publish content in a variety of media, reaching millions of people every day. The single-publication rule, which prevents every copy of a newspaper or every click on a website from giving rise to a separate cause of action, protects journalists and news outlets from the threat of endless defamation litigation. It also ensures that when journalists publish online, they can include hyperlinks—which connect readers to additional

information—without those links leading to liability. Curtailing the single-publication rule's online protections would adversely affect the ability of *amici* and other journalists to carry out their vital role of informing public debate.

INTRODUCTION AND SUMMARY OF ARGUMENT

Hyperlinks are essential internet tools. By providing readers the ability to move easily from the article they are reading to a vast range of complementary and source materials, hyperlinks allow them to take advantage of the internet's almost limitless capacity to inform. Using hyperlinks, readers can delve deeper into topics that interest them, learn important context and background for the top news stories of the day, and in some cases see an article's sources for themselves. Appellants' argument that hyperlinking to a previously published article republishes allegedly defamatory statements in that article threatens to stifle use of this valuable tool. Amici urge the Court to reject Appellants' republication theory, which a number of courts across the country have already rejected.

In 2012, The Verge published two articles about Appellant Stephen G. Perlman's OnLive videogame streaming venture. Two years later, The Verge published a third article about Perlman, this time profiling his invention of pCell technology, which promises to improve cellphone reception in crowded spaces like sports stadiums. The 2014 article about pCell included a hyperlink and brief reference to one of the 2012 articles about OnLive. Later in 2014, Appellants,

including Perlman, sued Vox Media, which publishes The Verge, for defamation based on certain statements in each of the three articles about OnLive.

As the superior court correctly held, Appellants' claims based on the 2012 articles are time-barred. California law governs this case[1] and provides a one-year statute of limitations for defamation. Under the single-publication rule, which applies to internet publishing, the limitations period began upon initial publication of the 2012 articles. Because Appellants did not sue until nearly two years after those articles were published, the statute of limitations has run.

Appellants attempt to skirt the statute of limitations and the single-publication rule by arguing that a hyperlink in the 2014 article to one of the 2012 articles purportedly "republished" the allegedly defamatory statements in both 2012 articles. The superior court correctly rejected this argument. Appellants' theory of republication based on hyperlinking is wrong not only as a matter of well-established law, but also as a matter of public policy. Republication requires either altering the substance of the original allegedly defamatory material or intentionally directing defamatory material to an entirely new audience by affirmatively restating defamatory remarks. Courts across the country have held that hyperlinks, even when accompanied by descriptions, do not constitute

---

[1] Appellants do not challenge the application of California law to this case in their appeal. *See* Appellants' Opening Br. 25.

republication. A hyperlink merely directs readers to the previous article; it does not restate any of that previous article's claims. At the same time, journalists have found hyperlinks to be important tools for streamlining reporting, informing audiences, connecting to collaborators, and promoting transparency. A ruling that adopts Appellants' theory of republication would chill the use of hyperlinks, reducing the free flow of information online and undermining the internet's potential for disseminating knowledge.

ARGUMENT

I. Under the single-publication rule, Appellants' defamation claims based on the 2012 articles are time-barred.

Appellants alleged below that three of The Verge's online articles are defamatory. The superior court correctly held that Appellants' claims with respect to the first two articles are time-barred under the single-publication rule and California's one-year statute of limitations. *See* Opinion & Order 15–22. Under California's statutory single-publication rule, which applies with equal force online, the time to file a defamation claim begins to run from the date of initial publication. The first two articles in this case were published on August 19, 2012, and August 28, 2012. But Appellants did not file suit until August 18, 2014, missing the deadline to sue for any allegedly defamatory statements in the 2012 articles by nearly a year. Appellants' claims based on the 2012 articles are thus time-barred.

In an attempt to avoid this straightforward conclusion, Appellants contend that the third article, published on February 19, 2014, republished the prior 2012 articles, triggering an exception to the single-publication rule and restarting the statute of limitations clock. But the 2014 article does not restate any of the allegedly defamatory material in the 2012 articles. Rather, the 2014 article only references the subject of the 2012 articles and includes a hyperlink to one of them. As other courts to consider the issue have resoundingly held, merely referring and hyperlinking to a previous article does not constitute republication. As explained in more detail below, this Court should reject Appellants' argument to the contrary and affirm the superior court's ruling.

A. The single-publication rule applies to internet publishing.

A number of courts, including in California, have held that the single-publication rule applies to internet publishing. In so doing, some courts have drawn an analogy between the benefits of applying the rule online and its purposes in the context of print media, including books and newspapers.

The single-publication rule's historical development provides important context for its modern application. Under the common law of the nineteenth century, each communication of a defamatory remark to a new audience constituted a separate publication, giving rise to a separate cause of action for defamation. *Shively v. Bozanich*, 80 P.3d 676, 683 (Cal. 2003) (detailing the

historical development of the single-publication rule). But well before the advent of the internet, this multiple-publication rule had become obsolete with the rise of mass print publishing. *See id.* at 683–85. Applying such a rule to mass-produced books and newspapers presented the potential for lawsuits stating hundreds or thousands of causes of action for a single issue of a newspaper or single edition of a book. *Id.* It also threatened to make a nullity of the statute of limitations, because any time the book or newspaper passed to a new reader, that would constitute a new "publication," giving rise to a fresh cause of action, possibly many years after the words were originally printed on the page. *Id.* The potential for the multiple-publication rule to produce absurd results was illustrated in a nineteenth century English case holding that a plaintiff could sue for libel based on a newspaper issued seventeen years earlier, on the theory that the plaintiff's purchase of a long-forgotten copy of the paper constituted a new publication. *The Duke of Brunswick v. Harmer* (Q.B.1849) 117 Eng. Rep. 75.

Eventually, American courts recognized that the common law rule "threatened unending and potentially ruinous liability as well as overwhelming (and endless) litigation." *Shively*, 80 P.3d at 684. The multiple-publication rule "threatened a volume of litigation and a potential for indefinite tolling of the period of limitations that, these courts realized, would challenge the ability and

willingness of publishers to report freely on the news and on matters of public interest." *Id.*

To avoid "the multiplicity and the staleness" of claims permitted by the multiple-publication rule, courts fashioned the single-publication rule, which provides that for any single edition of a newspaper or book, no matter how many copies are produced, any cause of action for defamation arises at the time of initial publication. *Id.* at 685. Under the single-publication rule, the statute of limitations begins to run from the "first general distribution of the publication to the public." *Id.* (citing *Belli v. Roberts Bros. Furs*, 49 Cal. Rptr. 625, 629 (Dist. Ct. App. 1966)); *see also* Restatement (Second) of Torts § 577 (Am. Law Inst. 1977). The single-publication rule protects not only defendants but also plaintiffs, by allowing them to recover fully in a single action. Many states, including California, have codified the single-publication rule statutorily. *See* Cal. Civ. Code § 3425.3.

Federal and state courts across the country have applied the single-publication rule online, where it arguably serves an even more vital purpose. In the seminal case of *Firth v. State*, the New York Court of Appeals recognized that internet publications "resemble those contained in traditional mass media, only on a far grander scale." *Firth v. State*, 775 N.E.2d 463, 465 (N.Y. 2002). Websites "may be viewed by thousands, if not millions, over an expansive geographic area for an indefinite period of time." *Id.* at 466. For that reason, the multiple

publication rule "would implicate an even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants." *Id.* Application of the single-publication rule to online publications is therefore necessary to prevent "a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise." *Id.*

California state courts, as well as federal courts applying California law, have adopted the reasoning of *Firth*, holding that the single-publication rule applies online. *See, e.g.*, *Yeager v. Bowlin*, 693 F.3d 1076, 1082 (9th Cir. 2012); *Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1167 (9th Cir. 2011); *Sundance Image Tech., Inc. v. Cone Editions Press, Ltd.*, 2007 WL 935703 at *6 (S.D. Cal. Mar. 7, 2007); *Traditional Cat Ass'n, Inc. v. Gilbreath*, 13 Cal. Rptr. 3d 353, 361–62 (Ct. App. 2004); *Taylor v. Kuwatch*, 2004 WL 1463046 at *1 (Cal. Ct. App. June 30, 2004) (unpublished).

The single-publication rule thus applies to The Verge's online articles in this case. The first two articles were each published in 2012, and the one-year statute of limitations began to run immediately upon the posting of those stories to the publicly available website. Because Appellants did not bring suit until 2014, their defamation claims based on the 2012 articles are time-barred.

B. The republication exception to the single-publication rule does not apply to the hyperlink and reference in the 2014 article.

Appellants seek to escape the time bar to their claims by invoking the republication exception to the single-publication rule. Specifically, Appellants argue that the 2014 article, which focused on Perlman's invention of pCell technology to address poor cellphone reception, republished the 2012 articles, which focused on Perlman's former videogame streaming venture, because it referenced and linked to one of the earlier articles. The opening sentence of the 2014 article reads: "Steve Perlman, the creator of the defunct game-streaming service OnLive, claims he has the answer to slow wireless service." Ex. 37 Transmittal Aff. of Jacqueline A. Rogers in Supp. of Pls.' Answer. Br. in Opp'n to Def.'s Mot. for Summ. J., A1278, Jan. 16, 2020. The phrase "defunct game-streaming service OnLive" includes a hyperlink to the August 28, 2012 article about OnLive. *Id.* Appellants argue that the 2014 article directs the 2012 articles to a new audience and "added to and enhanced" the defamatory statements in the 2012 articles. *See* Appellants' Opening Br. 27–37.

Traditionally, republication occurs when a defendant edits and retransmits allegedly defamatory material after the initial publication, such as in a second edition of a book. Courts generally look to factors including whether the original

publication was altered or modified, which is not alleged here,[2] and whether "the speaker has affirmatively reiterated [an allegedly defamatory statement] in an attempt to reach a new audience that the statement's prior dissemination did not encompass." *Clark v. Viacom Int'l Inc.*, 617 Fed. App'x 495, 505 (6th Cir. 2015); *see also Christoff v. Nestle USA, Inc.*, 62 Cal. Rptr. 3d 122, 136–37 (Ct. App. 2007), *aff'd in part, rev'd in part*, 213 P.3d 132 (Cal. 2009). However, a new audience for the original publication, alone, cannot establish republication, because such a rule would reinstate the old, rejected multiple-publication rule.

Courts have roundly rejected attempts to weaken the republication standard in the internet context, recognizing the risk of undermining the single-publication rule. A number of courts have held that simply continuing to host an article on a website, or making minor technical changes to that website, does not constitute republication. *See, e.g.*, *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 615–16 (7th Cir. 2013); *Yeager*, 693 F.3d at 1083; *Roberts*, 660 F.3d at 1167–68; *Jankovic v. Int'l Crisis Grp.*, 494 F.3d 1080, 1087 (D.C. Cir. 2007); *Firth*, 775 N.E.2d at 466–67.

---

[2] Appellants argue that the 2014 article republished the 2012 articles because, they claim, it "added to and enhanced" the 2012 articles through the statement in the 2014 article that OnLive was "defunct." Appellants' Opening Br. 27–32. However, they do not — and cannot — argue that the 2012 articles were themselves altered. As explained below, the Court should reject Appellants' argument that the reference to one of the 2012 articles in the 2014 article constituted republication.

Courts have also generally held that a hyperlink to a previous article, even where that hyperlink includes a description or reference, does not constitute republication. Indeed, since the superior court's decision in this case, several courts around the country, including a federal court in California applying California law, have reaffirmed that merely hyperlinking to an existing website is not a republication of that website. *See, e.g.*, *Nunes v. Lizza*, 2020 WL 5504005 at *20 (N.D. Iowa Sept. 11, 2020); *Penrose Hill, Ltd. v. Mabray*, 2020 WL 4804965 at *8 (N.D. Cal. Aug. 18, 2020);[3] *Lokhova v. Halper*, 441 F. Supp. 3d 238, 254–56 (E.D. Va. 2020), *appeal docketed*, No. 20-1437 (4th Cir. Mar. 30, 2020).

The logic of these decisions is straightforward: When a prior article was already published to "a prominent, publicly accessible news website," then that posting "has already been directed at most of the universe of probable interlocutors" and "run-of-the-mill hyperlinks, website updates, or interface redesigns typically demonstrate neither the intent nor the ability to garner a wider audience than the initial iteration of the online statement could reach." *Clark*, 617

---

[3] In *Penrose Hill*, the court held that a Tweet linking to an allegedly defamatory blog post did not republish the "vast majority" of the statements in the blog post because the statements "do not appear in the text of the Tweet or in the link preview." 2020 WL 4804965, at *8. The court also held that the Tweet republished certain specific statements in the blog post because those statements *actually appeared* in the "Tweet preview." *Id.* at *8. Like the vast majority of the statements that the court held were not republished in *Penrose Hill*, the allegedly defamatory statements in the 2012 articles did not actually appear in the 2014 article.

Fed. App'x at 506. As one federal court applying California law explained, a hyperlink is "more reasonably akin to the publication of additional copies of the same edition of a book, which is a situation that does not trigger the republication rule." *Sundance Image Tech.*, 2007 WL 935703 at *7. That alone should be enough to decide the republication issue in favor of Appellee here.

Appellants argue that The Verge's hyperlink should be treated as a republication because they claim it added to or updated the prior allegedly defamatory material in the 2012 articles, Appellants' Br. 27–32, and intentionally directed readers to the 2012 articles, *id.* at 33–34. However, three cases from outside California are directly on-point and find no republication under such circumstances. The logic of those decisions is persuasive and should foreclose a republication finding here as well.

First, an appellate court in New Jersey held that a press release on a state agency's website did not republish a previous report, even though the press release "directly referenced the report and invited visitors to the site to view the report." *Churchill v. State*, 876 A.2d 311, 315 (N.J. Super. Ct. App. Div. 2005). The court held that the press release "altered the means by which website visitors could access the report, but they in no way altered the substance or form of the report." *Id.* at 319. For that reason, the court concluded, "to treat the changes as

republications would be inappropriate and defeat the beneficial purposes of the single publication rule." *Id.*

Second, a federal district court in Kentucky held that the Southern Poverty Law Center's "Hate Blog" did not republish an article titled "A Few Bad Men" about the plaintiff, despite a hyperlink and reference to the article. *Salyer v. S. Poverty Law Ctr., Inc.*, 701 F. Supp. 2d 912 (W.D. Ky. 2009). In reaching that conclusion, the court made clear that simply directing a new audience to an old article is not enough to establish republication. With respect to the reference, the court found no republication because "the common thread of traditional republication is that it presents the material, *in its entirety*, before a new audience." *Id.* at 916 (italics added). A mere reference "may call the *existence* of the article to the attention of a new audience," but "it does not present the *defamatory contents* of the article to that audience." *Id.* (italics in original). Likewise, with respect to the hyperlink, the court acknowledged that, in a way, the entire purpose of linking to an article is to attract new readers. But the court found no republication because "the critical feature of republication is, again, that the original text of the article was changed or the contents of the article presented directly to a new audience." *Id.* at 917. Hyperlinks, while creating a new method for accessing old articles, simply do not republish allegedly defamatory material.

Finally, the Third Circuit rejected a claim that an editorial in *The Philadelphia Inquirer* republished allegedly libelous reporting on charter schools. The editorial included the following reference and hyperlink: "Some city charter schools . . . are soaring. But if you follow the remarkable reporting of my colleague Martha Woodall (http://go.philly.com/charter), you'll see greedy grown-ups pilfering public gold under the guise of enriching children's lives." *In re Phila. Newspapers*, *LLC*, 690 F.3d 161, 165–66 (3d Cir. 2012). The court held that reference—which is more detailed and extensive than the one at issue here—did not constitute republication. It first observed that in print media, "a mere reference to an article, regardless how favorable it is as long as it does not restate the defamatory material, does not republish the material." *Id.* at 175. It then held that the same rule should apply online: "[T]hough a link and reference may bring readers' attention to the existence of an article, they do not republish the article." *Id.*

Applying these precedents here, The Verge's 2014 article about pCell technology did not republish either 2012 article about OnLive. The 2014 article did not even link to or reference any of the allegedly defamatory statements in the August 19, 2012 article. The 2014 article did include a hyperlink to the August 28, 2012 article, but it did so with a reference to OnLive being defunct, which does not restate any allegedly defamatory statement from the August 28, 2012 article. As in

all three cases discussed above, the 2014 article did not alter the original substance of either 2012 article, nor did it restate any of the allegedly defamatory contents of either 2012 article. The Verge's description of OnLive as "defunct" was a mere non-defamatory reference to the August 19, 2012 article. The Verge referenced its previous reporting on OnLive by describing it as defunct; it did not substantively add to it. Thus, the republication exception to the single-publication rule does not apply, and Appellants' claims based on the 2012 articles are time-barred.

II. A republication rule that deters hyperlinking would deprive internet users and publishers of an essential tool for understanding information online.

If Appellants were to prevail in their argument that hyperlinks can constitute republication, news outlets and other online publishers would be deterred from including hyperlinks in their articles. Such a rule would harm the public interest. Hyperlinks are essential tools for the public to discover and better understand information on the internet. In an article, hyperlinks can direct readers to additional material that provides invaluable background, context, and evidence.

Much has been written about the virtues of hyperlinks in online journalism. In an influential article on the subject, Jonathan Stray argued that the "noble hyperlink" has four journalistic purposes. *See* Jonathan Stray, *Why Link Out? Four Journalistic Purposes of the Noble Hyperlink*, Nieman Lab (June 8, 2010), https://perma.cc/EC7X-F7K3. First, links streamline storytelling. Rather than

muddy up an online article with asides to define terms or provide background, journalists can include links for those who need that additional information and cut to the chase for those who do not. The hyperlink in the 2014 article arguably fits into this category, briefly referencing Perlman's previous venture, but then moving on quickly to focus on his latest invention. Second, links keep audiences informed. Journalists can use hyperlinks to round up coverage, both internal and external to their own publications, on the topics they cover. Third, links are a currency of collaboration, allowing different reporters to link to one another's pieces, creating a fuller picture of the news and pushing reporting forward, with each new story building on the last. And finally, links enable transparency. A link is a form of attribution, just like saying "according to John Doe" in a printed piece, links can show readers how a journalist learned what she's telling them.

Others have added to this list. Links provide readers "who seek greater depth a richer array of information" and shows them "the extensive research behind the story they are reading." Michael Schudson & Katherine Fink, *Link Think*, Colum. Journalism Rev. (Mar./Apr. 2012), https://perma.cc/Q3CF-BMG2. "Hyperlinks imbue a news story with the power of the World Wide Web, allowing writers to source information, explain detail and provide depth in ways unique to the medium." Robert Niles, *When to Hyperlink Within an Online News Story?*, Online Journalism Rev. (Apr. 11, 2011), https://tinyurl.com/y3dumsz6. And links

permit journalists to cite their sources seamlessly, without cluttering the prose with clunky attribution. Felix Salmon, *Why Journalists Need to Link*, Reuters (Feb. 27, 2012), https://perma.cc/C76N-X4VX.

Simply put, the internet is a richer information environment, particularly for journalism, when stories include relevant hyperlinks. Permitting defamation liability to flow from the use of hyperlinks would have "a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise." *Firth*, 775 N.E.2d at 466.

CONCLUSION

WHEREFORE, for the foregoing reasons, *amici* urge this Court to hold that Appellants' defamation claims as to the 2012 articles are time-barred under the single-publication rule, and affirm the superior court's ruling.

Respectfully submitted,

/s/ David L. Finger

David L. Finger (DE Bar #2556)
FINGER & SLANINA, LLC
One Commerce Center
1201 N. Orange St., 7th fl.
Wilmington, DE 19801
(302) 573-2525
dfinger@delawgroup.com
Attorney for Amici Curiae

OF COUNSEL:

Katie Townsend
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS
1156 15th St., NW, Suite 1020
Washington, D.C. 20005
Telephone: (202) 795-9303
Facsimile: (202) 795-9310

Dated: Dec. 7, 2020

EFiled: Dec 07 2020 04:18PM EST
Filing ID 66165642
Case Number 305,2020

SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN G. PERLMAN; REARDEN LLC, a California limited liability company; and ARTEMIS NETWORKS LLC, a Delaware limited liability company, Appellants, v. VOX MEDIA, INC., a Delaware corporation, Appellee.	C.A. No. 305, 2020 Courts Below: Superior Court of the State of Delaware, New Castle County, C.A. No. N19C-07-235 PRW-CCLD Court of Chancery of the State of Delaware, C.A. No. 10046-VCS

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rules 13(a)(i) and 28(c) because it has been prepared in Time New Roman 14-point typeface using Microsoft® Word for Mac, Version 16.43.

2. This brief complies with the type-volume limitation of Rule 28(d) because it contains 4,126 words, which were counted by Microsoft® Word for Mac, Version 16.43.

/s/ David L. Finger

David L. Finger (DE Bar #2556)
FINGER & SLANINA, LLC
One Commerce Center
1201 N. Orange St., 7th fl.
Wilmington, DE 19801
(302) 573-2525
dfinger@delawgroup.com
Attorney for Amici Curiae

Dated: Dec. 7, 2020

EFiled: Dec 07 2020 04:18PM EST
Filing ID 66165642
Case Number 305,2020

Exhibit 2

EFiled: Dec 07 2020 04:18PM EST
Filing ID 66165642
Case Number 305,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN G. PERLMAN; REARDEN LLC, a California limited liability company; and ARTEMIS NETWORKS LLC, a Delaware limited liability company, Appellants, v. VOX MEDIA, INC., a Delaware corporation, Appellee.	C.A. No. 305, 2020 Courts Below: Superior Court of the State of Delaware, New Castle County, C.A. No. N19C-07-235 PRW-CCLD Court of Chancery of the State of Delaware, C.A. No. 10046-VCS

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Supreme Court Rule 7(g), amici make the following disclosures:

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-For-Profit Corporation law. It is not publicly traded.

The Atlantic Monthly Group LLC is a privately-held media company, owned by Emerson Collective and Atlantic Media, Inc. No publicly held corporation owns 10% or more of its stock.

Boston Globe Media Partners, LLC, is a privately held company. No publicly held corporation owns 10% or more of its stock.

BuzzFeed Inc. is a privately owned company, and National Broadcasting Company (NBC) owns 10% or more of its stock.

California News Publishers Association ("CNPA") is a mutual benefit corporation organized under state law for the purpose of promoting and preserving the newspaper industry in California. No entity or person has an ownership interest of ten percent or more in CNPA.

The Center for Investigative Reporting (d/b/a Reveal) is a California non-profit public benefit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

Courthouse News Service is a privately held corporation with no parent corporation and no publicly held corporation holds more than 10 percent of its stock.

The Daily Beast Company LLC is a wholly-owned indirect subsidiary of IAC/InterActiveCorp, a publicly traded company.

Dow Jones & Company, Inc. ("Dow Jones") is an indirect subsidiary of News Corporation, a publicly held company. Ruby Newco, LLC, an indirect subsidiary of News Corporation and a non-publicly held company, is the direct parent of Dow Jones. News Preferred Holdings, Inc., a subsidiary of News Corporation, is the direct parent of Ruby Newco, LLC. No publicly traded corporation currently owns ten percent or more of the stock of Dow Jones.

The E.W. Scripps Company is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. BlackRock, Inc. and the Vanguard Group, Inc. each own ten percent or more of the stock of Gannett Co., Inc.

The Investigative Reporting Workshop is a privately funded, nonprofit news organization based at the American University School of Communication in Washington. It issues no stock.

Los Angeles Times Communications LLC is wholly owned by NantMedia Holdings, LLC.

The Maryland-Delaware-D.C. Press Association is a 501(c)(6) organization that has no parent corporation and issues no stock.

The McClatchy Company, LLC is privately owned by certain funds affiliated with Chatham Asset Management, LLC and does not have publicly traded stocks.

The Media Institute is a 501(c)(3) non-stock corporation with no parent corporation.

MediaNews Group Inc. is a privately held company. No publicly-held company owns ten percent or more of its equity interests.

Meredith Corporation, an Iowa corporation, is a publicly traded company on the New York Stock Exchange under the symbol MDP. Black Rock, Inc., publicly traded on the New York Stock Exchange under the symbol BLK, owns ten percent (10%) or more of Meredith Corporation's stock.

MPA - The Association of Magazine Media has no parent companies, and no publicly held company owns more than 10% of its stock.

The National Association of Black Journalists (NABJ) is a non-profit corporation with no publicly traded stock and no parent corporation.

National Journal Group LLC is a privately-held media company, wholly owned by Atlantic Media, Inc. No publicly held corporation owns 10% or more of its stock.

National Newspaper Association is a non-stock nonprofit Florida corporation. It has no parent corporation and no subsidiaries.

The National Press Club Journalism Institute is a not-for-profit corporation that has no parent company and issues no stock.

The National Press Club is a not-for-profit corporation that has no parent company and issues no stock.

National Press Photographers Association is a 501(c)(6) nonprofit organization with no parent company. It issues no stock and does not own any of the party's or amicus' stock.

The New York Times Company is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company owns 10% or more of its stock.

The News Leaders Association has no parent corporation and does not issue any stock.

News Media Alliance is a nonprofit, non-stock corporation organized under the laws of the commonwealth of Virginia. It has no parent company.

NYP Holdings, Inc. is a Delaware corporation, with its principal place of business in New York, and is the publisher of the New York Post. News Corporation, a publicly held company, is the parent of NYP Holdings, Inc. News Corporation has no parent company and no publicly held company owns more than 10 percent of its shares.

Online News Association is a not-for-profit organization. It has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

No publicly held corporations own any stock in the Philadelphia Inquirer, PBC, or its parent company, the non-profit Lenfest Institute for Journalism, LLC.

POLITICO LLC's parent corporation is Capitol News Company. No publicly held corporation owns 10% or more of POLITICO LLC's stock.

Radio Television Digital News Association is a nonprofit organization that has no parent company and issues no stock.

The Seattle Times Company: The McClatchy Company, LLC owns 49.5% of the voting common stock and 70.6% of the nonvoting common stock of The Seattle Times Company.

The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

Time USA, LLC is a privately held limited liability company. No publicly held corporation owns 10% or more of its stock.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

Verizon Media's parent corporation is Verizon. No publicly held corporation owns 10% or more of Verizon Media's stock.

WP Company LLC d/b/a The Washington Post is a wholly-owned subsidiary of Nash Holdings LLC, a holding company owned by Jeffrey P. Bezos. WP Company LLC and Nash Holdings LLC are both privately held companies with no securities in the hands of the public.

No publicly owned corporation has a substantial financial interest in the outcome of this appeal.

Date: December 7, 2020

/s/ David L. Finger
David L. Finger (DE Bar #2556)
FINGER & SLANINA, LLC
One Commerce Center
1201 N. Orange St., 7th fl.
Wilmington, DE 19801
(302) 573-2525
dfinger@delawgroup.com
Attorney for Amici Curiae

EFiled: Dec 07 2020 04:18PM EST
Filing ID 66165642
Case Number 305,2020

CERTIFICATE OF SERVICE

I, David L. Finger, hereby certify that on this 7th day of December, 2020, I caused a copy of the foregoing document to be filed electronically via *File&ServeXpress*, which caused notice thereof to be served electronically upon the below-listed counsel of record:

Matthew E. Fischer, Esq.
Jonathan A. Choa, Esq.
Jacob R. Kirkham, Esq.
Jacqueline A. Rogers, Esq.
Potter Anderson & Corroon LLP
313 North Market Street
P.O. Box 951
Wilmington, DE 19899

Peter L. Frattarelli, Esq,
Archer & Greiner, P.C.
300 Delaware Avenue, Suite 1100
Wilmington, DE 19801

/s/ David L. Finger
David L. Finger (DE Bar ID #2556)
Finger & Slanina, LLC
One Commerce Center
1201 N. Orange St., 7th floor
Wilmington, DE 19801-1186
(302) 573-2525
dfinger@delawgroup.com