IN THE SUPERIOR 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, Plaintiffs, v. VOX MEDIA, INC., a Delaware corporation, Defendant.	Civil Action No. N19C-07-235 PRW CCLD

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 23 MEDIA ORGANIZATIONS IN SUPPORT OF DEFENDANT

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press, ALM Media, LLC, Atlantic Media, Inc., 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, The Media Institute, MediaNews Group Inc., Mother Jones, MPA – The Association of Magazine Media, NBCUniversal Media, LLC, News Media Alliance, Online News Association, POLITICO LLC, Radio Television Digital News Association, Reveal from The Center for Investigative Reporting, Society of Environmental Journalists, Society of Professional Journalists, Tully Center for Free Speech, and Verizon Media. A description of each of the amici is listed at Exhibit A of this brief.

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.

As members and representatives of the news media, amici have a strong interest in ensuring that journalists and news organizations are able to 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, is essential for protecting amici from the threat of endless defamation litigation. In the context of online publishing, journalists should continue to be free to 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 essential constitutional role of informing public debate.

INTRODUCTION AND SUMMARY OF ARGUMENT

Hyperlinks are essential internet tools. By providing readers the ability to move seamlessly from the article they're reading to a vast range of complementary materials, hyperlinks allow them to take advantage of the internet's almost limitless capacity to inform. 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. Plaintiffs' argument that a hyperlink should be deemed to constitute republication of allegedly defamatory statements in a previous article threatens to stifle use of this valuable tool. Amici write to urge the Court to reject Plaintiffs' republication theory, which a number of courts across the country have already rejected.

In 2012, The Verge published two articles about Mr. Perlman's OnLive videogame streaming venture. Two years later, The Verge published a third article about Mr. 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, Plaintiffs, including Mr. Perlman, sued Vox Media, which publishes The Verge, for defamation based on all three articles' coverage of OnLive.

Plaintiffs' claims regarding 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

[1] As a matter of conflict-of-laws analysis, California law should apply in this case. To the extent that the Court chooses instead to apply the law of a different jurisdiction, amici's republication analysis, derived from the common law, is broadly applicable across jurisdictions.

limitations period began upon initial publication of the 2012 articles. Because Plaintiffs did not sue until nearly two years after those articles were published, the statute of limitations has run.

Plaintiffs 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. This argument is wrong as a matter of well-established law and as a matter of public policy. Republication requires either affirmatively restating defamatory remarks or intentionally directing defamatory material to an entirely new audience. Courts across the country have held that hyperlinks, even when accompanied by descriptions, do not constitute 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 storytelling, informing audiences, connecting to collaborators, and promoting transparency. A rule that creates liability for hyperlinks would deter their use, reducing the free flow of information online and undermining the internet's potential for disseminating knowledge.

ARGUMENT

I. UNDER THE SINGLE-PUBLICATION RULE, PLAINTIFFS' CLAIMS BASED ON THE 2012 ARTICLES ARE TIME-BARRED.

Plaintiffs allege that three of The Verge's online articles are defamatory. With respect to the first two articles, Plaintiffs' claims are time-barred under the single-publication rule and California's one-year statute of limitations. Under California's statutory single-publication rule, which applies with equal force online, the time to file suit for defamation 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 Plaintiffs did not file suit until August 18, 2014, missing the deadline to sue for any alleged harm attributable to the 2012 articles by nearly a year. Any claims based on the 2012 articles are thus time-barred.

In an attempt to avoid this straight-forward conclusion, Plaintiffs 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 Plaintiffs' argument to the contrary.

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 holding, those courts have often 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 19th 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 actions 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 placed on the page. *Id.* The potential for the multiple-publication rule to produce absurd results was illustrated in a 19th century English case holding that a plaintiff could

sue for libel based on a newspaper issued 17 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 Furs*, 49 Cal. Rptr. 625 (Cal. Ct. App. 1966)). *See also* Restatement (Second) of Torts § 577 (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. 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 (9th Cir. 2011); *Sundance Image Techs. v. Cone Editions Press*, 2007 WL 935703 at *6 (S.D. Cal.); *Traditional Cat Ass'n, Inc. v. Gilbreath*, 13 Cal. Rptr. 3d 353, 361–62 (Cal. Ct. App. 2004); *Taylor v. Kuwatch*, 2004 WL 1463046 at *1 (Cal. Ct. App. 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 Plaintiffs 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 Reference and Hyperlink in the 2014 Article.

Plaintiffs seek to escape the time bar to their claims by invoking the republication exception to the single-publication rule. Specifically, Plaintiffs argue that the 2014 article, which focused on Mr. Perlman's invention of pCell technology to address poor cellphone reception, republished the 2012 articles, which focused on Mr. Perlman's former videogame streaming venture, by referencing and linking to one of the earlier articles. Specifically, 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." The phrase "defunct game-streaming service OnLive" includes a hyperlink to the August 28, 2012, article about OnLive. Plaintiffs argue that the 2014 article directs the 2012 articles to a new audience and reasserts their allegedly defamatory statements.[2]

[2] The 2014 article does not link to the August 19, 2012, article at all, so any republication allegation related to that first article is indirect at best.

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, 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 (Cal. 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, of course, cannot alone establish republication, because such a rule would reinstate the old, rejected multiple-publication rule.

Courts have roundly rejected attempts to soften the republication standard on the Internet, recognizing the risk of undermining the single-publication rule. A number of cases have held that simply continuing to host an article on a website, or making minor technical changes to that website, do not constitute republication. *See, e.g.*, *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610 (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.

Courts have also agreed that a hyperlink to a previous article, even where that hyperlink includes a description or reference, does not constitute republication. The

logic 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 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 Techs.*, 2007 WL 935703 at *6. That alone should be enough to decide the republication issue in favor of Defendants here.

To the extent that the Court views The Verge's hyperlink differently because it is accompanied by a reference to the hyperlinked article, 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. 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.* 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 174. It then held that the same rule should apply online: "though 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 substance of either 2012

article, nor did it restate any of the allegedly defamatory contents of either 2012 article. Thus, the republication exception to the single-publication rule does not apply, and Plaintiffs' claims based on the 2012 articles are time-barred.

II. A REPUBLICATION RULE THAT DETERS HYPERLINKING WOULD DEPRIVE INTERNET USERS OF AN ESSENTIAL TOOL FOR UNDERSTANDING INFORMATION ONLINE.

If Plaintiffs 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*, Niemen 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 don't. The hyperlink in the 2014 article arguably fits into this category, briefly referencing Mr. 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. (March/April 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://perma.cc/7W56-HAAF. 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 rob internet users of those links 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 465.

CONCLUSION

For the foregoing reasons, amici urge this Court to hold that Plaintiffs' defamation claims as to the 2012 articles are time-barred under the single-publication rule.

Respectfully submitted,

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