

PRINCES OF BULLSH*T NEWS

How a small group of journalists at BuzzFeed destroyed, by libel, the reputation of a journalist and ruined a thriving news organization.

The Victims

Michael Leidig is a British journalist who lives and works in Vienna. A graduate of Hull University in Yorkshire, England, he had been a journalist at newspapers and wire services for six years when he moved to Vienna in 1993 to work as a news anchor on an English-language radio station, where he picked up, over the succeeding years, the German in which he became fluent. In 1995, he founded Central European News, whose business was reporting news stories out of non-English-speaking countries, originally in central Europe but, later, in addition, from other countries, including China, India, Russia, Spain, and Spanish-speaking countries in Latin America. At the time of the libel, CEN produced nearly 8,000 stories each year, offering them for sale to media companies in England and the United States. Its stories are produced via a software system designed by Leidig that stores information as to the stories' source material, allows for layers of editing, and retains a copy of the final story that is offered to clients.

The Defamer

The article that would ruin the reputations of Leidig and CEN was published by BuzzFeed, Inc., a news and entertainment website that mixes original reporting

and user-generated content, and, at the time of the libel, was one of the ten most-visited news and information websites in the United States. NBCUniversal has invested \$400 million in BuzzFeed, and it has been valued at nearly two billion dollars.

The Genesis of the Libel

The BuzzFeed article was conceived in BuzzFeed's London bureau in 2014, when a small group of journalists found that they believed the same thing about CEN—that its output was too good to be true.

When Tom Phillips, senior writer at BuzzFeed UK, requested that the journalists recall stories that had gone “viral” on the Internet that they considered to be fraudulent, stories that “the internet thought were true but actually weren't true,” one BuzzFeed journalist, Rossalyn Warren, responded “99% of CEN stories;” another, Alan White, responded “Woman paying for trip round china with sex,” and “Every other CEN story ever.” The responses caught the attention of BuzzFeed UK's editor in chief, Luke Lewis, who suggested that BuzzFeed do an exposé. “It's fascinating,” he emailed his journalists, “I think a feature on it would go down a storm.”

Only one of the London-based BuzzFeed journalists voiced any reservations about the project. News Editor Richard James emailed the group: “We aren't immune to publishing fake news/falling for hoaxes ourselves, so as long as we

focus on the incredible pick-up this guy's ridiculous stories get across the world we're on firmer footing than simply screen grabbing 10 Mail stories." His advice would be ignored, however, and the article would become a pure hit piece based on "exposing" supposedly "debunked" CEN stories with the aim of creating the implication that Mr. Leidig and his company make up fake news stories—not just that they occasionally fall for a hoax. Luke Lewis suggested that the working title of the proposed Article should be "Inside the viral bullshit factory."

The BuzzFeed journalists faced one problem, however: they knew that they didn't have the journalistic skill set to actually investigate individual CEN stories, many of which originate in countries like Russia, China, and India. Since the BuzzFeed journalists had no foreign-language skills, and no journalists working in those countries, Alan White opined that his initial view was that the task was "basically impossible." He then suggested: "I suppose what we have to do is make contact with local reporters in those areas who are somewhere near those remote locations where this outrageous stuff allegedly happens. Even then, I just don't quite see how were [sic] going to reach the point where we can go 'This is definitely fake.'"

Lewis came up with a proposed solution to the problem, however—just rely on innuendo and implication. As he put it: "You might not have to. Could interview verification experts, someone like Craig Silverman, and get to the point

where there was enough of a question mark over the stories.” Added eventual co-author Phillips: “Yeah, it’s about establishing a pattern of dubiousness, you only need a few definitive fakes plus a load of dodgy-sounding ones.”

As they considered doing the story about CEN, what they did not know, and never learned, was that CEN was not just a wire service located in Vienna, Austria—it had reporters on its payroll working in countries around the world, including China, India, and Russia. Those reporters regularly did their own stories, and regularly did additional reporting to verify and, in some cases, to enrich with additional facts, stories circulating in the countries they covered. This lack of knowledge led the BuzzFeed journalists to assume that the unique quotes found in some CEN stories must be made up, or that unique stories must be fraudulent. As one internal BuzzFeed memorandum, written by eventual co-author Craig Silverman, summarized the view of CEN at that time:

In some cases they take the original information about an image and translate those details into English. In other cases, they fabricate quotes to accompany the basic details of the story, or they will invent a story out of whole cloth to accompany the images.

Since the BuzzFeed journalists already knew what they believed to be the truth, their efforts to write the article involved only collecting evidence that seemed to support their belief, much of it Internet posts by others claiming to “debunk” CEN stories. Although BuzzFeed documents show that they realized that their research should include investigations, in places like India or China, into the

details of CEN stories, they decided not to do that, as too difficult. With the exception of one email exchange between a BuzzFeed journalist who did not speak Russian, and a Russian photographer who did not speak English, almost no actual journalism was conducted by the BuzzFeed journalists.

Most importantly, any evidence that cut against their presupposition was discounted and ignored. The most prominent example is a story CEN did out of China reporting that a young woman spent days in a 24-hr Kentucky Fried Chicken restaurant after being dumped by her boyfriend. Thought to be, by various of the BuzzFeed journalists, “total bollocks,” “debunked,” and “Confirmed Fake,” it was featured prominently in an early draft of the article, but, when it was discovered that the story was true, and the quotes it contained genuine, all references to it were removed.

The resulting story was published on the BuzzFeed website on April 24, 2015. Titled “The King of Bullsh*t News”, it was subtitled: “How a small British news agency and its founder fill your Facebook feed with stories that are wonderful, wacky—and often wrong.” Weighing in at about 7,000 words, it portrayed Mr. Leidig and his company as fabulists—fraudsters who created fake stories, and who libeled innocent persons without a thought of the harm they caused.

The Cast of Characters

It is instructive to compare the backgrounds of the three BuzzFeed bylined writers, Craig Silverman, Alan White, and Tom Phillips, with three of the CEN journalists whose careers the article blighted, John Feng, Ana Martinez and Shantanu Guha Ray, each of whom testified in video pre-trial “depositions” in the ensuing libel case.

For CEN:

John Feng is Taiwanese, and at the time of the Article was living and working in Taiwan, covering primarily China. He graduated from college in Taiwan, with a degree in Slavic language and literature, and is fluent in Mandarin Chinese, English, and Russian.

Ana Martinez graduated from the University of Madrid in 2004 and has two B.A.s, one in Spanish language and one in journalism. She has two master’s degrees in audio-visual performance, from Complutense University of Madrid and Instituto Radio Television of Espanola. After working for news agencies and newspapers, she began with CEN after winning a scholarship to intern there in Vienna in 2013, and she was reporting stories out of Spain and Latin America. She has near fluency in English, in addition to her native Spanish.

Shantana Guha Ray was CEN’s reporter in India. He has a B.A. in commerce and master’s degree in journalism. Having held jobs as newspaper copy

editor, newspaper reporter, and magazine editor, he has written for Time Magazine and Agence France-Presse, and was for several years the India correspondent for ESPN. He is fluent in English and Hindi. He had joined CEN because the flexibility allowed him to work on books.

All three CEN journalists testified at length in depositions about how they go about their reporting, and they denied that they or any other CEN employees make things up. John Feng described the process by which CEN takes a story circulating in, for example, China, and turns it into a CEN offering. He said:

Q Can you tell us the sequence of events that occur as the story goes from the initial spotter's information to the finished product?

A Yes. The first step is the spotter who finds the story. And then the commissioning editor is the one who decides whether a story should be done or not.

After that, the story is copy-checked to ensure that it is recent and that – to see whether it has already been published by, by our clients, in which case, we wouldn't do the story.

After that, there is the journalist who writes the story into a more presentable format, closer to what the final product would look like. But the editor would be the one who really makes sure that the top line [in America, lead sentence or "lede"] is correct and the geography is there, et cetera.

After that, if relevant, there would be an illustrations editor, who is the one who acquires permission to use videos or pictures. And then, if relevant, a picture editor or a video editor.

After that, a subeditor, who makes sure that the relevant information is there and that it's grammatically correct, and, you know, without any spelling errors.

And then finally, the staff member, who sends the story to our clients.

For BuzzFeed:

Craig Silverman, one of the three bylined BuzzFeed journalists, is a Canadian journalist and media specialist. He is graduate of Concordia University in Montreal, and his acquaintance with Canadian French was the only foreign-language skill enjoyed by the three bylined authors; no one else at BuzzFeed who worked on the piece was fluent in any language other than English.

Silverman was hired as a consultant by BuzzFeed to work on the article. At the time he had developed what he was touting as a software program that could detect bogus articles on the Internet, called Emergent, and he was attempting to sell it to BuzzFeed while the article was being prepared. Based on a subjective “truthiness” rating (the word apparently borrowed from the American comedian Stephen Colbert), it was used in connection with the preparation of the article; asked if it had worked, co-author Alan White answered simply, “no.” Emergent proved so unwieldy that BuzzFeed’s then editor in chief Ben Smith showed no interest in it, and it promptly fell by the wayside, never to be heard of again. Following publication of the Article, Mr. Silverman was hired by BuzzFeed as its Canadian editor, and then as its media editor.

Co-author Alan White was a BuzzFeed reporter based in London. A graduate of Oxford, with a diploma in journalism from City University in London, he had worked, previously to his BuzzFeed stint, as an English teacher, a freelance

journalist and researcher, and an aide in a government office. Prior to going to work on the article he had specialized in the “listicles” for which BuzzFeed was well known—articles comprising interesting lists. One listicle he had written was posted by BuzzFeed on April 14, 2015, eleven days before publication of the article. Its title? “17 People Who Got Unspeakably Horny Due to ‘Game of Thrones.’” He has no foreign-language skills.

Tom Phillips, the third co-author, is a Cambridge graduate, with a degree in natural sciences. Prior to BuzzFeed he had held a variety of journalism jobs, including spending six years at Metro, a free daily newspaper distributed in the U.K. At the time of the article, he was a senior writer at BuzzFeed. He has no foreign-language skills. He has been described by some as having a hatred for tabloid news. In one illustrative incident, a tabloid, the Scottish Sun, had solicited from its readers designs for its front page. Phillips is said to have drawn a crude picture of an erect penis, and submitted that, publishing the image on the Internet. Shown the drawing at his deposition in the libel case, he testified that he couldn’t remember whether or not he had drawn it. At the time of his deposition he had left BuzzFeed and was, as he put it, “in between jobs.”

The only foreign-language expertise BuzzFeed used in preparation of the Article was that of a young Chinese-American BuzzFeed journalist who was working in the U.S. She was added to the team even after she made it clear that

she could neither read nor write Chinese, and could speak or understand it with only a fifth-grade proficiency.

Perhaps the most significant trait shared by the BuzzFeed journalists who prepared the Article was that, since they believed CEN was dishonest, they hated it, or professed to hate it. Comments in a Slack chatroom used by the BuzzFeed journalists during the preparation of the article included: “I hate CEN,” “that bloody KFC story,” “FUCKING CEN,” and “so much hate, for CEN. Noted!” Tom Phillips joined the chat one day with the text: “joins in late just to add another voice to the / ‘fuck CEN/’ consensus.”

A Redacted Letter

As they worked on the Article, the BuzzFeed journalists also decided they would look into a charity Mr. Leidig had set up, called Journalists Without Borders. The charity was aimed at raising money for persons discussed in news stories who were in unfortunate situations. Suspecting that the charity was a scam, the BuzzFeed journalists wrote of it in the Article that it “claims to provide money to the needy sources featured in CEN stories.” The use of the verb “claimed,” was, of course, a way to suggest the description of it was false. Prior to publication, when Mr. Leidig learned of what was going to be included in the article, he contacted a London law firm, and that firm sent BuzzFeed a letter taking issue with

the allegations of fraudulent journalism. The lawyers' letter also dealt with the charity, in a paragraph that read:

As to your questions about Journalism With (sic) Borders [JWB] our client has already given you details of those to whom enquiries about its finances can be addressed. Mr. Leidig is Vice-Chair of the National Association of Press Agencies, with responsibility for special projects, and he is constantly looking for new ideas. Whilst JWB has not, to date, raised significant sums, it is a project in which our client still believes and hopes can be re-invigorated, but this requires time and energy from volunteers.

In the article, the BuzzFeed journalists refer to the letter and provide readers with a hyperlink to a copy of it. In the posted letter, however, the paragraph dealing with Journalism Without Borders is blacked out. In the article, the journalists wrote that they had “redacted one section dealing with matters outside the scope of the current story.” That statement is clearly false, since the story had discussed the charity in a way that cast doubt on its legitimacy. Clearly the redaction was done to conceal evidence that the charity had offered to open its books to the BuzzFeed reporters, which would have contradicted the defamatory gist of the Article.

The Perfect Quote

The BuzzFeed journalists had no idea CEN had reporters in several other countries, and thus believed that Leidig, sitting in his Vienna office, was adding fake quotes to stories. “Ha, good old CEN,” Silverman emailed Tom Phillips, when Phillips approached him about the proposed article, “I remember them from

years ago. Always the just-too-perfect story, sourced from a language few would know.” In their cluelessness, they archly implied that fakery in the article. For example, they wrote:

CEN’s stories frequently contain lines from someone that no one else could persuade to talk, including the local media. And many of those quotes, especially those from anonymous “officials”, include phrases that one would expect to hear from someone who grew up in the UK.

In fact, as noted, CEN had reporters that are native to the countries where they speak “a language few would know.” CEN’s Guha Ray testified at his pre-trial “deposition” in the resulting libel case how he took a story arising in a small Indian village, did additional reporting using his contacts in the press and law enforcement, and added quotes to the story that were among the ones singled out by BuzzFeed as likely faked, because they only appeared in CEN’s version of the story.

Since none of the BuzzFeed reporters had foreign-language skills, they had no expertise enabling them to opine on the art of translation—including using “phrases that one would expect to hear from someone who grew up in the UK.” In the memo he wrote, Silverman said, in a section labeled “suspect quotes” he wrote, “People often speak in paragraphs and use Anglicized phrases such as ‘off sick,’ ‘quite normal’, ‘stop off’, ‘massive hoo-ha.’” Asked at his deposition what was wrong about using “Anglicized phrases,” he responded as follows:

Q How should language be translated, if not perfectly?

A As much as possible, you want to exactly reflect what the person has said.

Q And what if the person says something in his native language or her native language that, in fact, corresponds to a quote, unquote, perfect expression in English? Is it correct to translate it in a perfect – into perfect English?

A If what they say has an exact expression in English, then you print that. If they use a colloquialism, then an option would be, for example, using the similar English one, but putting it in brackets, so people understand it's not their exact words.

Q You mean that if someone uses a slang expression, for example, in a foreign language, and you are translating it into English, merely translating it into a similar slang expression in English is incorrect?

A In my view, you want to, as much as possible, reflect exactly what they said. And if they used a colloquialism in that language, you can include it and then explain what it means, or you could substitute it for the English one and use brackets.

It can be seen that Silverman has some very strange ideas about how bilingual reporters do their jobs. In his deposition Mr. Ray testified how he got the additional quotes, one of which he translated as: "lynch justice."

Q [by a BuzzFeed lawyer] And this police spokesman said to you, “People cannot take the law into your own hands. As deplorable as these crimes, law and order has to be maintained and not lynch justice. We ask those men who carried out this attack to hand themselves in before we find them”?

A Exactly.

Q But what language did he, the police spokesman, speak?

A He spoke in Hindi.

Q And who translated these quotes into English?

A I did.

Q And did you do it word-for-word?

MR. WISE: Objection to the form.

A I did it word-for-word.

Q So what is the Hindi word for “lynch justice”?

A Aag kakanoon, which means you’re settling your score and you’re ensuring justice through fire. Not in literary (sic) sense, but you are actually taking a very, very drastic step to settle scores and handle crime.

The exchange went on, but clearly Mr. Ray was demonstrating how a reporter skilled in two languages translates from one to the other, and why the “word for word” suggestion of Mr. Silverman and BuzzFeed is simply clueless.

Ms. Lenina's Pink Kitty

More evidence of the general cluelessness of the BuzzFeed journalists is the article's segment discussing CEN's reporting on the pink kitten of Russian media figure Elena Lenina. Intent on accusing Leidig and CEN of callously not caring about harm to people they write about, those journalists wrote, in a section entitled: "Who is it Hurting?" the following:

Misleading stories built around a compelling image can have real-world consequences. As an example of this is the CEN story about a woman named Elena Lenina, who dyed her kitten pink, which supposedly caused the animal's death from blood poisoning. This was covered by outlets such as the *Daily Mail* and *Metro*.

As *Gawker's* Antiviral site pointed out, the story was false. The kitten was not dead. Lenina was in fact simply posting pictures of her – very much alive – kitten on social media.

As with the Sandoval case, this appears to be a situation where CEN sold a false and (and potentially defamatory) story about a real person with little regard for the consequences that person would face when the story went viral. Nor has there been any apparent attempt to correct the story since it was proved to be false.

Here's what had actually happened. Ms. Lenina is a public personality in Russia who is famous for being completely outrageous. She refused to wear seatbelts, because, she said, her breasts are too big. She appeared with a hairpiece including a clear glass cage housing a live tarantula, and she was photographed walking a naked man on a leash. A huge scandal arose around her in Russia when she appeared on television with a kitten she had died pink and a rumor began

circulating that the dye had caused the death of the kitten. Thousands of angry Russians signed petitions calling for her to be punished.

Responding to the scandal, Ms. Lenina posted a video on social media of a kitten she said was the same kitten, still alive. Many in Russia were not convinced, however, noting that there was no proof it was the same kitten.

These events were accurately reported by CEN in two stories. The first story accurately reported that Ms. Lenina was under fire from animal-rights activities for allegedly causing the death of the kitten, and the second story was headlined: “Pretty in Pink Kitten is Still Alive claims Star.” Thus, in each instance, CEN was accurately reporting the events of a scandal that was a huge story in the Russian press.

In writing that “as *Gawker*’s Antiviral site pointed out, the story was false. The kitten was not dead,” BuzzFeed demonstrated its complete lack of journalistic rigor, because it was relying solely on a New York-based web site, *Gawker*, which had only reported Ms. Lenina’s social media post, and offered no other evidence as to whether the kitten had been killed or not. And, in suggesting that Ms. Lenina might have been particularly injured by CEN’s story, BuzzFeed demonstrated its completely cluelessness about who Ms. Lenina was.

A Front-Up Lie

To increase the impact of their story, the BuzzFeed journalists decided to try to meet with him to confront him with their allegations. How to convince Leidig to meet with them? Editor Heidi Blake suggested flattery. She proposed that BuzzFeed pretend to be interested in the long-form investigative journalism Leidig was most proud of—such as an article on child trafficking that she described him as “beaver away on...for literally years.” Alan White tried it. He sent an email to Leidig, saying:

“The idea behind our piece is to explore the challenges of reporting in the digital age in depth, and how the appetite for quick-fire viral news can end up starving serious journalism of oxygen. I’m particularly interested in the way you manage that mix, because our chat made it clear to me that you’re trying to do important, challenging investigative journalism while at the same time producing a very high volume of lighter viral or tabloid stories. I’m hugely interested in how that balance works and I’d love to talk to you about it some more.

It was White who had suggested, as the original working title for the article: “How One Man in Austria became King of Viral Bullshit.” And when the possibility of visiting Mr. Leidig was discussed, he developed cold feet, stating his concern was “Purely personal safety. We’re telling him we’re about to destroy a business that took him over a decade to build along with his entire professional credibility. You just do not know how a person will react to being put in that situation, nor who he knows out there. If that sounds over cautious so be it.”

He wasn't given that chance—Leidig had no interest in meeting with BuzzFeed, whom he viewed as a competitor, and now an obvious enemy.

Post-Publication Crowing

Upon publication of the Article, the BuzzFeed journalists patted each other on the back. Editor Heidi Blake congratulated the three authors for the way they had “dismantled the CEN fiction machine.” Editor Robert Colville emailed the team that they should check in with CEN’s clients to see “whether they’ll carry on using its content.” Luke Lewis agreed: “So, what comes next? How do we follow up, keep up the pressure? If one of these publishers DOESN’T immediately stop dealing with CEN it looks terrible for them. Should we ring round on Monday?” One of Michael Leidig’s journalist friends had a more negative reaction. He emailed, “Whose wife did you sleep with?”

BuzzFeed gets a Break

Shortly after the article was published, BuzzFeed got a break. A Polish journalist living in Glasgow who had been an outspoken critic of the depiction of his countrymen in the British press contacted BuzzFeed about a CEN story out of Poland two years previously that had been shown to contain incorrect information—the charge that a “Santa” and a “helper” in a Christmas-time sleigh ride that ended in a crash had been drunk. The story had resulted in a successful

complaint to Britain's Press Complaints Commission and the story's deletion from sites that had used it.

Alan White and the Polish journalist traveled to the small town where the incident had occurred, and White published a story detailing the pain the false charge had caused the husband and wife who had been involved in the crash, and the photographer whose photographs, posted to local media, had resulted in the CEN story. At the time of the complaint to the Press Commission, the CEN reporter had said the erroneous information had come from the photographer's initial post that had been published without editing by a Polish newspaper, and which admitted this had been later deleted and replaced by a reporter's version hours later, with no record of the original story that the CEN reporter had used in any way saved. Nevertheless, the story about the pain the falsity had caused and attributed to CEN rather than the Polish media that admitted deleting their article was added by BuzzFeed to its evidence in the libel suit, and, although not discussed by any of the judges who decided the case, may very likely have influenced the decision.

The Lawsuit

Mr. Leidig and CEN filed suit in the Southern District of New York on January 25, 2016. The written "complaint" had attached to it a copy of the Article, and pointed to specific parts of the article alleged to be false and defamatory.

BuzzFeed filed a written “Answer” denying that anything in the Article was false, and denying that anything in the article is defamatory of Leidig or CEN.

“Defamatory” means tending to cause a bad opinion of someone, and BuzzFeed’s denial of that, by way of its lawyers, was unusual.

Even more surprising is the fact that, having been sued, BuzzFeed promptly took the position that it had never meant to say anything bad about Mr. Leidig personally. The language in the article directly concerning Mr. Leidig is:

“But then the bottom fell out of the business ... after 9/11, and it seemingly never recovered.

So it appears that Leidig decided to play the online game as he saw it. He launched websites such as the *Austrian Times* and *Croatian Times*. He cast his net far afield to China, India, and Latin America, scouring for images and posts on social networks that he could weave a story around in order to hit up old clients with a new kind of content.

Mr. Leidig alleged that that language charged him with taking images and posts on the Internet and creating fake stories around them.

BuzzFeed denied that it had meant anything of the kind. No, it argued, what was meant was only that Mr. Leidig searched the Internet for story leads. This was the testimony of a BuzzFeed witness, under oath. Alan White testified that the language was only meant to say that Mr. Leidig “looked on foreign social media for stories and generated ... leads that way.” And BuzzFeed’s lawyers were equally emphatic, arguing in their brief (in support of their motion for “summary

judgment” –that is, a decision by a judge, before any trial, that one side should win):

And BuzzFeed never says that CEN—out of financial desperation after 9/11—built a business model based on selling false stories. It says that CEN got into the business of selling viral stories after 2001.

In response, Leidig and CEN came forward with evidence that showed, they argued, that this argument was feigned. They argued that on January 19, 2015, three months before publication of the article, co-author Craig Silverman sent the memo described above, setting forth what he believed about CEN and Mr. Leidig. As noted above, he had written that they find images on the web and “[i]n some cases they take the original information about an image and translate those details into English. In other cases, they fabricate quotes to accompany the basic details of the story, or they will invent a story out of whole cloth to accompany the images.”

In the same memorandum, Silverman offered his theory as to why CEN, which he said appeared to have begun as a legitimate agency, had turned to fraud. In a section titled “When CEN went Bad,” it begins: “At one point CEN seemed to be pretty legitimate ... They used to write for Radio Free Europe ... and be interviewed as part of Nightline segments.” It goes on to say that it seems CEN was “hammered by the internet and ran into financial difficulties,” and concludes: “So his business has been suffering. I bet he’s had to get rid of a lot or all of those

English-speaking journalists. This seems to give us a bit of perspective on why CEN does what it does.”

This idea, that Leidig and CEN had been driven by financial woes to turn to making up fake stories or quotes, was included as the conclusion of an early draft of the article, under a sub-heading: “CEN Gone Bad.” That excerpt concludes the story with the words:

Leidig decided to play the Internet game as he saw it. He launched websites such as the Austrian Times and Croatian Times. He cast his net far afield to China and India and Latin America, scouring for images and posts on social networks that he could weave a story around in order to hit up old clients with a new kind of viral content he knew they couldn’t resist.

“With hundreds of thousands of new items a day who can tell what is new anymore?” Leidig wrote.

Or, for that matter, what’s real.

Most of the same words, without the sub-heading, were included in the published article, as discussed above, without the sub-head “CEN Gone Bad”:

Mr. Leidig and CEN argued that this sequence shows exactly what the words “weave a story around” were intended to mean—making up fake stories. If the passage only meant “look for stories to report,” they argued, the draft’s sub-head “CEN Gone Bad” would have made no sense, because looking for story leads on the Internet is not “bad.”

They argued that the attempt by BuzzFeed witnesses and counsel to claim the words only mean “look for stories to report” appeared to be a calculated effort

to falsely represent the intent and meaning of the published words, because BuzzFeed knew it had no evidence to support what was and is pure speculation on the part of Craig Silverman. That argument was not addressed by any of the four U.S. federal judges who considered the libel suit.

The Libel Suit's Fatal Flaw

The evidentiary flaw that would eventually doom CEN's and Leidig's libel case is that both the reporter who had handled the Russian stories, Mladen Dotchev, a Russian-fluent Bulgarian, and the reporter who had handled the stories from China, would not be available to provide evidence in support of the libel case. Dotchev was dead. He had died, suddenly and unexpectedly, before the lawsuit was brought. The Chinese stringer had left the company before suit was brought. Somewhere in Communist China, he could not be compelled to provide evidence to refute BuzzFeed's libel. CEN and Leidig would therefore have to rely on other evidence to show that BuzzFeed's charge of fraud was false. The four federal judges who would eventually agree that the suit should fail would hold, erroneously but perhaps understandably, that the absence of such evidence was a fatal flaw.

As Mr. Leidig and CEN struggled with the "discovery" phase of the lawsuit, the exchange of evidence and information (the cost of assembling, and delivering, thousands of electronic documents was a significant expense for Leidig and CEN,

and pocket change for BuzzFeed) they moved for “summary judgment,” that is a decision that the case, or at least some important issues, can be decided without the need of a jury (to decide what the “facts” are if there is a dispute). They asked the trial judge, Hon. Victor Marrero, to find that their assertion of what the libelous “sting” of the Article was—the charge that Mr. Leidig and CEN made up fake stories or fake quotes—to find also that the charge was false, and to find that Mr. Leidig and his company were not, as BuzzFeed alleged, “public figures,” that is, people who have taken significant public stances in connection with some important issue that justifies writing about them, and who, under First Amendment law, have to meet a higher standard to recover for libel.

The “public-figure” claim by BuzzFeed, through its lawyers, was particularly specious, though, because, in the article, the BuzzFeed journalists had described CEN as a “small news agenc[y] largely unknown outside certain sections of the media” And, regarding Mr. Leidig, in his memo, BuzzFeed’s Mr. Silverman had described Mr. Leidig as “someone who is not a well-known journalist.” Of course, media defendants, as a matter of course, characterize their libel-suit opponents as “public figures,” because, why not? What was unusual about BuzzFeed’s claim is that, midway through the lawsuit, the lead lawyer for BuzzFeed admitted in a court appearance that she had “zero evidence of Mr.

Leidig's public figure status" –an admission that showed the defense had been included in the pleading despite the fact that there was no evidence to support it.

One reason Leidig and CEN made their motion was to ascertain what evidence BuzzFeed had to back up its claim of making up stories or quotes. Was there a disgruntled former employee telling lies? Or some other evidence that would necessitate presentation to a jury?

Responding to the motion, BuzzFeed submitted no evidence at all. It argued that it should be allowed to have "discovery" from Mr. Leidig and CEN before the issues were decided. Judge Marerro agreed. Aside from demonstrating that BuzzFeed had no evidence, other than whatever was included in the article, that Mr. Leidig or CEN had made up stories or quotes, the most significant part of the decision was Judge Marrero's failure to rule on what the "gist" or "sting" of the libel is. In every libel case, it is up to the judge to make a preliminary ruling on whether or not what the plaintiffs are arguing to be the gist of the libel is a reasonable interpretation of the words published. BuzzFeed argued, completely speciously, that it was "premature" to make that decision, and Judge Marerro agreed. This would have fateful consequences for the case.

After Leidig's and CEN's motion was denied, there ensued a contentious, months long wrangle over the exchange of evidence; when that was over, the case was ready for decision, either by the judge on summary judgment, or by a jury, if

the judge found that there were any issues over what the facts were (because deciding what the facts are is the role of the jury). It is the judge who determines what the law is to be applied, and so instructs the jury, which then, in theory at least, applies the law to the facts it has found to be true, and renders its verdict.

BuzzFeed then moved for summary judgment. Its strategy was to focus on the inability of CEN to prove where the quotes came from, or other details known only to the reporters, with respect to certain CEN stories singled out for inclusion in Leidig and CEN's complaint, and argue that they were all that the case was about, and thus that Mr. Leidig and CEN couldn't prove their case. In order to be successful at that strategy, BuzzFeed would have to keep Judge Marrero from ruling that the case was about the general charge of making things up—at any time and on any story.

In response, Mr. Leidig and CEN argued again that the Judge should rule on the “gist” of the libel, and that, since the gist of the libel is that Mr. Leidig personally, and his company, make things up, and since Mr. Leidig and four of his reporters had testified that they don't make things up, but, rather, report news stories, and since, it had turned out, BuzzFeed had no evidence showing that Leidig or anyone else at CEN had ever made up a news story or quote, that the issue ought to be decided by a jury, not by the judge.

BuzzFeed argued that the court should reject plaintiffs' argument that the gist of the libel was the general claim of journalistic fraud because that would be "expanding the complaint." This was a creative argument, because the complaint began with the general allegations that Leidig and CEN don't make things up, then moves to the additional discussion of individual passages.

Perhaps that might have gone plaintiffs' way, but BuzzFeed had one more ace up its sleeve. In a decision several years earlier, a three-judge panel of the appeals court that would hear Leidig's and CEN's case if it were appealed, had considered the appeal of a libel case after the plaintiff had succeeded at trial. There were several passages that the injured party, a broadcaster, had successfully shown to be libelous of him. With respect to whether one of the statements was false, however, the only evidence at trial had been the broadcaster's answers to two questions. Asked if the statement was true, he answered "no;" asked whether it was true or false, he answered, "false." The appellate court held that that testimony was insufficient to raise a question as to the truth of the publication, stating:

"While a bland, cryptic claim of falsity supported by the credibility of a witness might be sufficient to establish falsity in other civil cases, the First Amendment demands more."

Mr. Leidig and CEN argued that the libel was the general claim of making things up, and that the hundreds of pages of testimony of Mr. Leidig and his

employees was neither “bland” nor “cryptic” and should be held more than ample to get the question to the jury. They also argued that to recognize that the libel was the general claim of fraud wasn’t “expanding” the complaint.

Judge Marrero found for BuzzFeed, granting summary judgment. Shockingly, to plaintiffs, he held, based on the quotation from the earlier case, that the testimony of Mr. Leidig and his employees was “no evidence” that the libel was false, and he held that plaintiffs’ argument that the libel was general was a “maneuver” that should be rejected.

Hopeful that what seemed like such an unjust result would be overturned on appeal, Leidig and CEN appealed. The appeal went to the Second Circuit Court of Appeals. In their brief, they pointed out that in the same earlier appellate opinion the court had held that the testimony of the broadcaster was more than sufficient to create a question of fact for the jury as to another issue where it was clear he was testifying about something of which he had personal knowledge. In other words, the “cryptic” and “bland” characterizations meant only that as to that issue he had not established a sufficient “foundation” to show that the answers were based on personal knowledge.

In their brief on appeal, BuzzFeed’s lawyers made some arguments that were simply not correct statements of fact. They argued that the meaning of the libel had not been an issue before Judge Marrero, when it clearly had been, twice,

and they wrote that “The undisputed record shows CEN’s stories are full of fabricated quotes ...” when there was no evidence at all that “showed” any quote had been fabricated—there was only the inability of CEN to prove where particular quotes in some stories had come from. This might allow a jury to infer that the quote had been made up, but it could not, if the legal rules of summary-judgment procedure were followed, be so interpreted by a judge on a summary judgment motion. On such motions, the rule is that the judge, in order to deprive a party of a jury trial, must interpret all the evidence as strongly as possible in his favor.

On appeal, the decision was affirmed. Again the court failed to rule on the issue of what the gist of the libel was. Again the court interpreted *Celle* as allowing it to disregard the testimony of Mr. Leidig and his journalists. And again, BuzzFeed’s tactic of focusing the Court on gaps in the proof as to the stories discussed in the complaint was successful. The court based its ruling on the same five stories, implicitly deciding that the absence of evidence from the reporters who had prepared the stories was fatal, because “Plaintiffs ‘can be expected to have easy access to additional proof of falsity,’ quoting language from *Celle*, and concluded “That is, Plaintiffs are better positioned than Defendant to show whether their reports of two-headed goats, people walking cabbages out of loneliness, and so on, were accurate and substantially true.” Sadly, because of the death of

Mladen Dotchev and unavailability of the Chinese reporter, Leidig and CEN had had no access to the evidence the court deemed essential.

Mr. Leidig and CEN had only two more chances to at least get the case to a jury—a petition to the entire appellate court to reconsider the decision, and a petition to the Supreme Court to consider the case.

The *En Banc* Petition

A petition for an *en banc* hearing is a request that the entire court—not just a panel of three judges, consider whether a panel decision is out of sync with previous decisions of the court. Here Mr. Leidig’s and CEN’s petition requested that the original panel reconsider the appeal, and that the entire court hear the case. Such petitions are almost always denied, but here Mr. Leidig and CEN thought they might have one fact that could pique the court’s interest—some sketchy arguing by BuzzFeed’s lawyers. On the appeal, they had argued, in opposition to the argument that Judge Marrero should have ruled on the gist of the libel, that it had not been presented to him when in fact it had been—twice. They also had argued “Plaintiffs are not entitled to a decision on every element of a meritless claim.”. As noted above, this wasn’t true. What had happened since the appellate decision was that CEN’s lawyer had discovered that, in another libel lawsuit against BuzzFeed where accurately arguing the law was apparently thought to be in BuzzFeed’s interest, the same attorneys had argued on BuzzFeed’s behalf:

In every defamation case, a threshold “question of law for the court to decide” is whether the words at issue are capable of bearing a defamatory meaning. *Jacobus v. Trump*, 156 A.D.3d 452, 453 (1st Dep’t 2017). ... Importantly, the court must consider the statements at issue in the context of the publication as a whole. *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dep’t 1999).

Mr. Leidig and CEN hoped that this evidence that the court had been misled as to the law might result in a rare reconsideration. The petition failed. In a one-sentence decision, the court said the petition was denied.

Last Chance—the Supreme Court

The final step in the ascending order of courts is the United States Supreme Court. Most of the requests of the court to hear a case are “certiorari” petitions, requesting that the highest court hear a case as a matter of its discretion. Disappointed litigants file thousands of petitions each year—only a few dozen are granted. To be successful, the petitioner must convince four judges of the nine-judge court that the case presents an issue that is important enough that the high court should take action. Here, again, counsel for Mr. Leidig and CEN had some reason to believe that, despite the daunting odds, the high court might be interested in the case.

In effect, the decisions of the district court and the appellate court had created a brand-new privilege for libel defendants, the idea that a victim of libel who comes to court and testifies that the libel isn’t true can have his testimony disregarded by the court. The Supreme Court, in years past, had expressed

reluctance to authorize additional “First Amendment” protections for libel defendants. The petition’s argument was that in interpreting *Celle* to invalidate the testimony of Mr. Leidig and his employees as weightless, the decision created a new privilege for libelers such as BuzzFeed. In addition, one very conservative member of the court, Clarence Thomas, had written in a concurring opinion in another libel case, that he believes the entire “First Amendment” jurisprudence stemming from the original decision, in 1963, in a case entitled *New York Times v. Sullivan*, applying some First Amendment freedom-of-the-press protection for libelous publications, should be reconsidered. He, and perhaps other conservative members of the court, believe that the First Amendment should not have been interpreted to limit libel suits—on the grounds that libel is not a kind of speech that deserves such protection.

The Supreme Court has the option, when it is interested in a petition, to request the opponent to file a brief in opposition. Here, the court did not find that necessary. It issued a one-sentence decision. The petition was denied. The libel suit had reached its end.

Epilogue

The London office of BuzzFeed, where the libelous article was conceived and prepared, is no more. It was closed as part of a general retrenchment by the formerly high-flying BuzzFeed, and then BuzzFeed News was shut down

completely as a failure. The journalists who produced the article have scattered. Craig Silverman, now at ProPublica, shared a George Polk award for business reporting based on a BuzzFeed series exposing misinformation problems at Facebook. Ben Smith left his editorship at BuzzFeed to become a media reporter at the New York Times, then left there for a new news startup, Semafor, where he is editor-in-chief.

Michael Leidig continues to report stories from around the world — still training reporters on the ground and is continuing to push for Buzzfeed to recognize its errors in the case, with the latest development that the official UK press complaints body Impress has agreed to investigate and has asked Buzzfeed to respond to the allegations. To date, Buzzfeed has not replied.

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