

THE MOTHER COURT

A NEWSLETTER OF THE SDNY CHAPTER OF THE
FEDERAL BAR ASSOCIATION

WINTER 2022 · VOLUME 2 · ISSUE 1



**December 16, 2021, FBA SDNY Chapter
Holiday Party at Stout (Financial
District)**



On September 25, 2021, Ray Dowd, former SDNY Chapter president, represented our Chapter at the FBA Annual Meeting & Convention and accepted the 2021 Meritorious Newsletter Award for *The Mother Court* newsletter.

TAKING ON CHALLENGES IN 2022

BY: MARGARET ENLOE

Every day, every week and every year has challenges. Some are big, some small, some avoidable and some almost insurmountable. This has been the fate of people's existence for millennia and 2022 will be no exception.

But, what we, as individuals, societies and institutions bring to these challenges is always new and ever-changing. Life demands this of us. We must be creative, intelligent, empathetic, and always curious. We must be interested in discovery, possibilities and making things happen because, otherwise, mediocrity, like fairy dust, will spread over everything we touch or want to achieve.

Understanding the meaning and purpose of what is and what could be helps drive our souls and motivate us to take on these challenges. They will not go away for the wishing of it. And, like the goals or intentions we set for our New Year, they are important to consider thoughtfully, maybe even experiment or have fun with and definitely take on, each day, with energy, enthusiasm and a dash of passion.

Margaret Enloe, who had an extensive career in law as a partner at PwC and previously as an associate at Skadden, is a professional certified coach who works with attorneys to increase job satisfaction and resilience, enhance leadership skills, realize career goals and facilitate transitions. www.MargaretEnloe.com.

A MESSAGE FROM THE PRESIDENT

Membership is a Verb.

Happy New Year, Everyone! I am excited that 2022 has arrived and what it means for the future of our bar association. Our focus this year is on YOU -- our members.

Membership in the FBA SDNY is not just a noun (*i.e.*, who you are); it's also a verb (*i.e.*, what you do). Besides growing our membership base, we want to ensure that the SDNY Chapter is serving your professional needs and supporting your federal practice. Whether it is through CLE and other programming, writing an article for *TMC* newsletter, mentoring or being mentored, or presenting on a panel, we want you to be an engaged and active SDNY Chapter member.

Our next virtual board meeting is on February 11, 2022 at 8:30 a.m. (for members only). You are welcome to join us and learn about our plans for the Chapter, and more importantly, discover how you can be involved. Send an email to sdny.fba@gmail.com for Zoom information.

Be sure to look for our Spring issue in April!



**Nancy Morisseau, President
SDNY Chapter**



[Directly Above] October 13, 2021, Trivia Game Night with the Young Lawyer's Division of the Custom International Trade Bar Association and the Hon. Cathy Seibel (SDNY), Hon. Ona Wang (SDNY), Hon. Jennifer Choe-Groves (CIT), Hon. Robert Katzmann (CIT), and Hon. Mark Burnett, Chief Judge (CIT).



[On the Left] October 14, 2021, FBA SDNY Chapter Installation Ceremony featuring Hon. Laura Swain, Chief Judge (SDNY), Hon. Jenny Rivera, Associate Judge, NY Court of Appeals, and Licha Nyiando, former Commissioner, New York State Division of Human Rights.

JUDGE'S PORTRAIT UNVEILED: Hon. Lisa Margaret Smith (ret.)

On October 8, 2021, the portrait of the Honorable Lisa Margaret Smith, retired United States Magistrate Judge for the Southern District of New York, was unveiled at the Charles L. Brieant, Jr. Courthouse in White Plains, NY. Judge Smith, who retired in September 2020, after more than 25 years as a United States Magistrate Judge, sat in the White Plains Courthouse with Magistrate Judge colleagues the Honorable Mark D. Fox and the Honorable George A. Yanthis, both now retired, and current colleagues the Honorable Paul E. Davison and the Honorable Judith C. McCarthy. She served as Chief Magistrate Judge from 2006 to 2008.

The unveiling event featured remarks from the Honorable Laura Taylor Swain, Chief Judge of the Southern District, the Honorable Colleen McMahon, Senior District Judge and former Chief Judge of the District, the Honorable Paul Davison, Chief Magistrate Judge, long-time friend Anthony J. Siano, Esq., and Karen J. Jason, Esq., Judge Smith's longest-serving law clerk. They spoke of Judge Smith's unifying presence in the Courthouse, in particular her leadership of weekly brown bag lunches with the White Plains judges, attendance at which was cemented by Judge Smith always bringing freshly-baked cookies. Her baking, her singing, and her overall dedication to the mission of the Court was a theme noted by all. After the remarks, Judge Smith's portrait was unveiled by her two children, Kinsey and J.T. Bowensmith.

The beautiful portrait features Judge Smith in her judicial robe, wearing a white lace collar with purple flowers, which Judge Smith wore during her last year on the bench in honor and memory of the late Justice Ruth Bader Ginsburg. This portrait is the first of a Magistrate Judge to be hung in any Southern District of New York Courthouse, and the first portrait of a woman judge to be hung in the White Plains Courthouse.

Judge's Portrait Unveiled (Continued)



Original Photo: Michael O'Donnell

The portrait hangs in the Ceremonial Courtroom on the second floor of the Briant Courthouse in the company of portraits of the late District Judges Briant, Lee Gagliardi, Gerard Goettel, and William Conner.

WHAT IS ILLEGAL ONLINE SHOULD BE ILLEGAL OFFLINE

BY: CARRIE GOLDBERG

(Adopted from the December 1, 2021 oral testimony to the United States Congress hearing on Holding Big Tech Accountable: Targeted Reforms to Tech's Legal Immunity).

I stand for the belief that what is illegal offline should be illegal online. I founded my law firm to represent victims of catastrophic injuries. In most of my cases, well over a thousand now, my clients' injuries were facilitated by tech companies.

The worst part of my job is telling people who've suffered horrific nightmares that Congress passed a law in the 90s that takes away their right to justice. *We can't sue, I tell them, because Section 230 of the Communications Decency Act lets tech companies get away with what they did to you.* Back in the 90s, lawmakers said by removing liability for moderating content, it would incentivize young tech platforms to be good Samaritans.

We know that's not what happened. I want to tell you three stories.

She is 11 years old.

He is 37.

They both are on the site Omegle.

The banner up top says "talk to strangers."

Omegle matches the two to video chat.



Maria Karas Photography

*She does protest.
And he says,
"you're free to
stop. But alas, I'd
have no choice
but to send these
videos to your
parents and
friends at school.
And the police.
You've created
child
pornography."*

WHAT IS ILLEGAL ONLINE (Continued)

The man comforts her in her 11 year-old loneliness.

At first he wants to see her smile.

Then he asks her to show *another* body part.

And

another

and another.

She does protest. And he says, "you're free to stop. But alas, I'd have no choice but to send these videos to your parents and friends at school. And the police. You've created child pornography."

This crime goes on for 3 years. He makes her perform for him and his friends. He forces her to recruit more kids on Omegle.

Our firm just filed her lawsuit claiming Omegle is a defectively designed product. It knowingly pairs adults and children for video chats. Omegle will say it's her fault, *we have no duty to monitor who uses our service.*

A terrified young man, Matthew, enters my office. His ex-boyfriend is impersonating him on the hook-up app Grindr. "He's sent hundreds of strangers to my home and job. He tells them I have rape fantasies and that if I protest, it's part of the game."

Matthew says he's done everything – reported to the police, got an order of protection, flagged the accounts on Grindr at least 50 times. We get a restraining order against Grindr requiring they ban Matthew's ex. Grindr ignores the order. The strangers keep coming, following Matthew into the bathroom at the restaurant where he works, waiting for him on the stairwell in his apartment building.

In her order throwing Matthew's case out of court, the judge said Grindr had a "good faith and reasonable belief that it was under no obligation to search for and remove impersonating profiles."

WHAT IS ILLEGAL ONLINE (Continued)

That good faith and so-called reasonable belief was based on the very existence of Section 230. The men kept coming for ten months after we brought our case, as many as 23 a day.

Over the past six months, I've met with seven families each whose child was killed because they purchased one fentanyl-laced pill on the app Snap. "He was only fourteen" "She was bored and just experimenting" "It was the pandemic." The dealer is still on this platform; still selling. Snap refuses to intervene.

So when I say victims of catastrophic injuries, it is not hyperbole. And the traps are set by internet platforms which have profited beyond any summit of wealth and power in the history of the world.

I'm not arguing to end the internet.
Or to end any of these companies.
Or to limit freedom of speech.

The nightmares my clients experience are not speech based.

We must distinguish between hosting defamatory content versus enabling, *profiting off of* criminal conduct.

For hundreds of years our civil courts are how everyday people get justice from individuals and corporations who've caused them injuries. And now that basic right to justice is nonexistent.

We have a mess here; one Congress created with Section 230. And a mess that *our* Congress must fix.

Reform is simple.

WHAT IS ILLEGAL ONLINE (Continued)

- **We must stop protecting platforms that willfully ignore egregious conduct like child exploitation, terrorism, and cyberstalking.** This is the case of Omegle.
- **We must stop protecting platforms that knowingly violate criminal laws or court orders.** This is Snap selling fatal drugs to my client's children and it is Grindr who was ordered to exclude Matthew's abuser.
- **We must stop protecting platforms that are nefarious Samaritans and that exist to be illegal.** Like the revenge porn sites featuring so many of my clients and the site that encourages suicide where my client's 27-year-old learned where to buy and how to use the \$18 preservative that he mixed with water.

What is illegal offline, should be illegal online.

Carrie Goldberg is the founder of victims' rights law firm, C.A. Goldberg, PLLC and the author of [Nobody's Victim: Fighting Psychos, Stalkers, Pervs & Trolls.](#)



TRENDS BASED ON RECENT SECTION 101 PATENT CHALLENGES IN SDNY

BY: WENDY R. STEIN AND DONALD R. BUNTON

Ever wonder how patent eligibility challenges are faring in the Southern District of New York?

Based on Docket Navigator data, in 2021 patents challenged under the patent-eligibility statute — 35 U.S.C. § 101 (“Section 101”) — in the S.D.N.Y. were invalidated 71.4% of the time—up from 63.6% in 2020. This article discusses court decisions issued in 2021, along with related implications for patentees and alleged infringers.

Under U.S. patent statutes, abstract ideas are not eligible for patenting. See *Perry Street Software, Inc. v. Jedi Techs., Inc.*, Civ. No. 20-04539, 2021 WL 3005597, at *9 (S.D.N.Y. July 13, 2021), citing *Alice Corp. v. CLS Bank, Int’l*, 573 U.S. 208, 216 (2014) (“*Alice*”). There has been much litigation post-*Alice* as to what constitutes an “abstract idea.”

Under the first step of the *Alice* framework, claims directed to longstanding commercial practices have been found to be abstract. Further, if a court finds that a patent does claim an abstract idea, it proceeds to examine whether elements of the claims provide an “inventive concept” sufficient to transform the abstract idea into patent-eligible subject matter. Courts have held that merely implementing an abstract idea using conventional computer components does not provide an inventive concept under this second step of the *Alice* framework.

Six decisions issued in 2021 wrestle with these questions—four of them found patents invalid using the *Alice* framework.

In *Perry Street Software*, currently on appeal to the Federal Circuit, a patent related to matchmaking was found invalid. See *Perry Street Software*, 2021 WL 3005597, at *1. The court found that facilitating human relationships was not a patent-eligible idea and that the patent merely “automated” a process that had long been performed manually.

In *Weisner v. Google*, also on appeal to the Federal Circuit, the court found patents related to the collection and recording of user movement and location history ineligible under the *Alice* framework. Civ. No. 20-2862, 2021 WL 3193092 (S.D.N.Y. July 28, 2021).

PATENT CHALLENGES IN S.D.N.Y (Continued)

In *Jewel Pathway LLC v. Polar Electro Inc.*, claims relating to environmental modeling to generate a traversable path in an area were found invalid under Section 101. Civ. No. 20-4108, 2021 WL 3621885 (S.D.N.Y. Aug. 16, 2021). Likewise, in *RDPA, LLC v. Geopath, Inc.*, No. 20-CV-3573, claims directed to a system and method for using monitoring devices to assess the exposure of media displays were found patent ineligible. 2021 WL 2440700, at *2 (S.D.N.Y. June 15, 2021).

In 2021, patents did survive Section 101 challenges in *Chewy, Inc. v. Int'l Bus. Machines Corp.*, Civ. No. 21-1319, 2021 WL 3727227 (S.D.N.Y. Aug. 23, 2021), and *Jacob's Jewelry Co., Ltd. v. Tiffany & Co.*, Civ. No. 20-4291, 2021 WL 2651656 (S.D.N.Y. June 28, 2021). In *Jacob's Jewelry*, the claims were found non-abstract and an inventive concept found to exist in specific stone arrangements disclosed in the patent.

So, what do these trends mean for patent litigants in the Southern District of New York?

First, the S.D.N.Y. may not be the best venue to assert patents vulnerable to Section 101 eligibility attacks. The District of Delaware and Northern District of Illinois may be more favorable venues, as Docket Navigator data shows that in 2021, less than 50% of Section 101 challenges in these jurisdictions were successful. Second, alleged infringers may want to waive venue challenges and stay in the S.D.N.Y. if sued there, though the landscape may change if *Perry Street Software* and/or *Weisner* are not affirmed on appeal. Finally, patentees may want to secure an opinion from counsel supporting the validity of asserted claims under Section 101, based on authority finding similar claims patent eligible.

The views expressed in this article are the personal views of the authors alone and do not necessarily represent the views of Chiesa, Shahinian & Giantomasi P.C. or any of its clients.



Wendy R. Stein, Member



Donald R. Bunton, Associate

Chiesa Shahinian & Giantomasi P.C.

SCENES FROM THE 2021 FBA ANNUAL MEETING & CONVENTION

SEPTEMBER 23 - SEPTEMBER 25, 2021
MIAMI, FLORIDA



Swearing in of Ann Kremer, 94th President of the FBA



EARLY DAYS IN FILING AN APPEAL AT THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BY: CATHERINE O'HAGAN WOLFE

The Clerk's Office at the Court of Appeals for the Second Circuit is the portal through which all the documents that pertain to a case pass. The Federal Rules of Appellate Procedure (FRAP) and the Court's Local Rules set out the requirements for filing. In addition, the Court's website posts CM/ECF filing instructions, forms, instructional pamphlets and a phone directory for each Clerk's Office department. At the outset of an appeal, counsel should review the rules and procedures as the Court requires lawyers to know what paper to file and when. Default dismissals are quickly entered when a lawyer is not attentive to form and brief deadlines. To litigate in the Second Circuit, a lawyer must be a member of the Court's bar. A lawyer who is not admitted when a notice of appeal is filed will be afforded temporary electronic filing authorization. If the lawyer does not immediately seek admission, authorization is terminated. With the exception of sealed documents, a lawyer files all papers electronically. Either a district court pre-appeal, or the court of appeals, must order sealing. A pro se litigant files documents either by mail or via a designated e-box the Court provides for unrepresented parties.

A party that seeks emergency relief must file a motion, with a T-1080 form, that complies with L.R. 27. The movant also must notify the case manager or administrative attorneys that it plans to file for emergency relief. The T-1080 form asks if the movant has notified the adversary and what the adversary's position is regarding the relief. The motion moves faster when the movant, not the Clerk's Office staff, ascertains this information. The Clerk's Office is organized to facilitate case management for the benefit of judges, lawyers, pro se litigants and the public. Because the knowledge required at the beginning and end of a case is specialized, there are case initiation and case closing teams. Other teams with specialized skill sets handle civil, criminal and prisoner cases, as well as those that involve federal agencies. A separate team manages the calendaring motions and appeals before a merits panel.

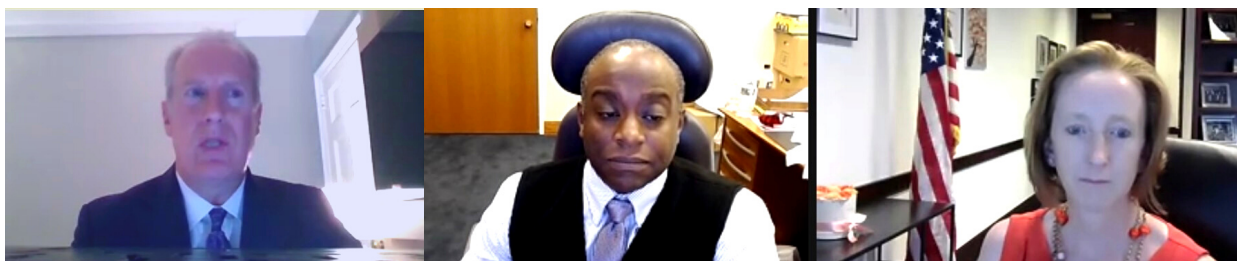
EARLY DAYS IN FILING AN APPEAL (Continued)

During the Covid-19 pandemic, the Court did not miss an argument day. For several weeks prior to the shutdown of all offices, the Court's IT staff worked with every judge and employee to ensure that all the Court's equipment was prepared for remote work. In addition, the Court tested the technology that makes remote oral argument possible. From March 2020 through May 2021, four to six Clerk's Office employees worked in the courthouse each day to handle documents filed via mail and the night box. Since that time, the Clerk's Office staff has worked alternate weeks in the courthouse. Chief Judge Debra Ann Livingston has announced that in light of the recent surge in Covid-19 infections, beginning January 4, 2022 oral arguments will be conducted remotely, by Zoom or teleconference.

Catherine O'Hagan Wolfe has been the Clerk of the Court at the Court of Appeals for the Second Circuit since 2007.



September 30, 2021, *Talking with Trailblazers* virtual series featuring Jessica Berman, Deputy Commissioner National Lacrosse League; the first woman Commissioner of a men's professional sports league.



October 21, 2021, Law Clerk Series with the Hon. Richard Sullivan (2d Cir.), Hon. Andrew Carter (SDNY), and Hon. Sarah Cave (SDNY) on the first panel. A second panel featured former and current clerks.



November 3, 2021, CLE program providing an overview of the legal landscape driving the sports inclusion backlash with regards to transgender athletes, particularly in high school sports.

The SDNY Chapter of the FBA extends heartfelt gratitude and best wishes to Bruce Moyer, who retired on September 30, 2021 after 25 years of service to the FBA as its Government Relations Counsel.



UPCOMING PROGRAMS

- **JANUARY 20, 2022** - [CLE] GRAB THEM BY THE WORKPLACE: UNDERSTANDING SEXUAL HARASSMENT IN THE #METOO ERA
- **FEBRUARY 3, 2022** - TALKING WITH TRAILBLAZERS FEATURING HON. ONA T. WANG (SDNY), HON. DIANE GUJARATI (EDNY) AND HON. SANKET J. BULSARA (EDNY)
- **FEBRUARY 24, 2022** - BLACK HISTORY MONTH/TALKING WITH TRAILBLAZERS FEATURING ALVIN BRAGG, MANHATTAN DA
- **MARCH 7-11, 2022** - NYC DEPT. OF EDUCATION CIVICS WEEK
- **MARCH 21, 2022** - [CLE] MENTAL DISABILITIES AND THE FEDERAL COURTS



Federal Bar Association

Southern District
of New York Chapter

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