

Media, Entertainment and First Amendment Newsletter, November 2020

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Nevermind: Who Really Owns Nirvana's Iconic Smiley Face Design?

Nirvana files new complaint after discovery calls into question whether Kurt Cobain was truly the artist behind the band's highly-recognizable design, with the band's infringement suit against fashion designer Marc Jacobs hanging in the balance.

Hey! Wait! Nirvana's got a new complaint! In its ongoing legal battle over the band's infamous "smiley face" logo, Nirvana LLC is now asking a California federal court to declare that Robert Fisher, a former art director for the band's label, does not own any rights to the design. It's the latest twist in a case with all the trappings of an IP law school exam question that leaves very little to smile about.

The overarching question in the case, involving Nirvana, fashion designer Marc Jacobs International LLC ("Marc Jacobs"), and now graphic designer Robert Fisher, is just who actually created the iconic design – the infamous smile with x's for eyes, and a crooked grin with its tongue hanging out – and, ultimately, who has the right to permit or enforce against its use. It's an issue that has remained hazy in this case, especially because the one person who, according to Nirvana, is best situated to settle the issue has been dead for more than 25 years. Pop culture lore, and the records at the U.S. copyright office, have long held that Kurt Cobain, the band's prolific frontman crafted the design. But Marc Jacobs, and now Fisher, are spinning a different tune.

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"Bad to the Bone" - The Libel-Proof Plaintiff Doctrine

Defendants in defamation lawsuits have a myriad of available defenses. One of them, the libel-proof plaintiff doctrine, holds that even if the defendants made false statements, the plaintiff may not recover more than nominal damages because such statements had minimal effect on the plaintiff's already sullied reputation. Importantly, the libel-proof plaintiff doctrine provides authors and publishers with a defense that, in appropriate circumstances, can dispose of defamation claims in pre-trial proceedings, thereby avoiding expensive and unpredictable discovery and trial.

The doctrine has developed along two pathways. The first—the "issue-specific" approach—bars relief for a plaintiff whose reputation related to a specific subject matter is so tarnished that he or she cannot be further injured by allegedly false statements on the matter. The second—the "incremental harm" doctrine—bars relief where the challenged statements harm a plaintiff's

reputation far less than unchallenged statements in the same article or broadcast. This article will highlight the issue-specific approach.

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