

488

Pre Show

1. Patreon comments

jim oh

6:30 PM

new patron, can my one time thanks be to the congressional apportionment amendment?

Daniel Caneer

11:19 AM

Hey I became a patron to add "2nd vote for Huntsville, AL live show" to your list of names, but I didn't see a place to do that.

Matt Weber

9:59 AM

Hi, I just backed the show here on Patreon. For my shout-out, please say, "The Deliverator belongs to an elite order, a hallowed subcategory.

-explain you just change your name

-you don't get on to the HOF until it's been a month

2. Listener Ale created an interactive widget so you can add Puerto Rico and DC as states or edit the population of any state and see how it affects apportionment

<https://apportionmentcalculator.com/>

## A. More on the Census and Apportionment

OA486

<https://openargs.com/oa486-apportionment-might-not-be-final/>

-existing lawsuit – will probably wind up covering  
State of Alabama v. Dep't of Commerce, 3:21-cv-00211 (M.D. Ala.)  
Over the use of “differential privacy”

-Alabama wasn't one of the states that gained or lost, and it's not close, so wtf?  
-not about the state-level data, it's about the block level-data

### Weird alliances

Explanation

<https://www.ncsl.org/research/redistricting/differential-privacy-for-census-data-explained.aspx>

### Due to Privacy Concerns, Reported Data Has Always Been Different from Raw Data

Since 2000, the bureau has used “data swapping” between census blocks as its main disclosure avoidance technique. (The [census block](#) is the smallest unit of geography maintained by the bureau.)

As a hypothetical example, consider a census block with just 20 people in it, including one Filipino American. Without any disclosure avoidance effort, it might be possible to figure out the identity of that individual. With data swapping, the Filipino American's data might be swapped with that of an Anglo American from a nearby census block—a census block where other Filipino Americans reside. The details for the person would be aggregated with others, and therefore not identifiable, and yet the total population in both census blocks would remain accurate.

Privacy amicus

<https://openargs.com/wp-content/uploads/Differential-Privacy-amicus-brief.pdf>

apparently this is a real threat

With differential privacy, the bureau has stated that the [total population](#) in each state will be “as enumerated,” but that all other levels of geography—including congressional districts down to townships and census blocks—could have some variance from the raw data. This is referred to by the Census Bureau as “injecting noise” into the data. The bureau has indicated that no “noise” will be injected into the state total population, but it is likely that noise will be injected for every other level of geography.

What Alabama wants:

<https://www.democracymatters.com/wp-content/uploads/sites/45/2021/03/Census-Data-Manipulation-Lawsuit.pdf>

-to release the full data without any “data swapping”

Different method but the same *kind* of thing.

## B. Chauvin motions

-Text of filing

<https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12646/Notice-of-Motion-and-Motion.pdf>

### 1. Impeach the verdict (second)

Minn. R. Crim. P. 26.03, subdivision 20(6)

[https://www.revisor.mn.gov/court\\_rules/cr/id/26/](https://www.revisor.mn.gov/court_rules/cr/id/26/)

What they've requested:

...on the grounds that the jury committed misconduct, felt threatened or intimidated, felt race-based pressure during the proceedings, and/or failed to adhere to instructions during deliberations, in violation of Mr. Chauvin's constitutional rights to due process and a fair trial.

- does not say BLM rally ("committed misconduct")
- felt race-based pressure – that's the Maxine Waters statement

-And they've asked for time to brief those issues

(6) Verdict Impeachment. A defendant may move the court for a hearing to impeach the verdict. Juror affidavits are not admissible to impeach a verdict. At an impeachment hearing, jurors must be examined under oath and their testimony recorded. Minn. R. Evid. [606\(b\)](#) governs the admissibility of evidence at an impeachment hearing.

R. 606(b)

[https://www.revisor.mn.gov/court\\_rules/ev/id/606/#606\(b\)](https://www.revisor.mn.gov/court_rules/ev/id/606/#606(b))

#### **(b) Inquiry into validity of verdict or indictment.**

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, **except that a juror may testify on the question [1] whether extraneous prejudicial information was improperly brought to the jury's attention or [2] whether any outside influence was improperly brought to bear upon any juror, or [3] as to any threats of violence or violent acts brought to bear on jurors, from whatever source, to reach a verdict, or [4] as to whether a juror gave false answers on voir dire that concealed prejudice or bias toward one of the parties, or [5] in order to correct an error made in entering the verdict on the verdict form.** Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Called a "Schwartz" hearing

Schwartz v. Minneapolis Suburban Bus Co., 104 N.W.2d 301 (Minn. 1960)

[https://scholar.google.com/scholar\\_case?case=9129875932461553174](https://scholar.google.com/scholar_case?case=9129875932461553174)

-did grant this kind of relief

With respect to the error upon which the new trial originally was granted, it appears that on the voir dire examination of the jury one John Herbert was asked if he could be a fair and impartial juror, and he answered in the affirmative. Attorneys for both defendants stated in affidavits that Herbert was also asked whether he or any member of his family had been involved in an accident and that his answer was in the negative. One of plaintiffs' attorneys, in a counteraffidavit, stated that Herbert was not asked this question. The trial court, in a memorandum, stated that it had no independent recollection as to whether or not the question was asked.

After the trial, an investigator for defendant bus company interviewed Herbert and took a statement from him from which it appears that about 4 years prior to the trial of these actions Herbert's daughter and her husband, while passengers in a cab, had been injured in an accident only a short distance from the place of the accident here in question. After litigation, they recovered some damages. In his sworn statement Herbert was asked:

"Q. Do you think that your daughter's accident influenced you in any way — did you have her accident in mind?

"A. All the time.

"Q. During the course of the trial?

"A. All the time, yes.

\* \* \* \* \*

"Q. Having in mind your daughter's accident and all the circumstances around that during the hearing and deliberations on this case, do you think you were at all influenced in your decision in this case by your daughter's accident?

"A. Well, I was; I could say yes, I suppose. \* \* \*

\* \* \* \* \*

328\*328 "Q. With your daughter's case in mind —

"A. Yes.

"Q. — you would favor the plaintiffs in this case, too, to a certain extent?

"A. Yes."

He stated further that he felt that the damages awarded his daughter and her husband were inadequate.

-case that limits that is *Olberg v. Minneapolis Gas Co.*, 191 N.W.2d 418  
[https://scholar.google.com/scholar\\_case?case=4887529380002368111](https://scholar.google.com/scholar_case?case=4887529380002368111)

**-1) concerned about interrogating jurors after the fact – reiterated strongly that you can't do that**

**-2) plain rule that says juror bias is not relevant: there's the dividing line**

**-3) here's how hard it is to win on this**

Defendant-appellant seeks review of an order granting a new trial on the grounds of jury misconduct. We agree with defendant's contention that the evidence does not show misconduct requiring a new trial and, accordingly, reverse.

The action arose from an automobile-pedestrian accident which occurred about 8 p.m. March 15, 1967, on 62nd Street East adjacent to the St. Paul-Minneapolis International Airport. The minor plaintiff and her companion, both 12-year-old girls, were walking along the south side of the street in a westerly direction. When they reached a point adjacent to the end of a runway, they decided to cross to the north side of the street because there was not enough room to walk on the south side. Plaintiff's companion testified to hurrying across the street because they were 'a little bit' afraid of a jet plane which was taking off just then.

Unfortunately, defendant's employee was at that time driving his truck in a westerly direction at between 25 and 30 miles per hour. It was not until he felt a thump and stopped his truck that he realized that he had struck and injured the plaintiff. The driver testified that he did not see either of the girls, although both of his headlights were operating. At the time in question, it was completely dark. An officer at the scene testified that he \*336 understood that the driver had either looked up or ducked when the jet went by close overhead.

At the subsequent trial, the jury retired to deliberate about noon, Thursday, April 2, 1970. Failing to agree, the jurors were allowed to separate that evening, pursuant to [Rules of Civil Procedure, Rule 47.03](#). On Friday, April 3, 1970, at about 9 a.m., the jury resumed its deliberations and, at 10:55 a.m. of that day, returned a unanimous verdict finding both parties equally at fault. Such a verdict, according to [Minn.St. 604.01](#), precludes plaintiffs from recovery of any damages.

Plaintiffs' attorneys notified the trial judge on Monday, April 6, 1970, of possible jury irregularities and requested a hearing which was held on April 8, 1970. At that hearing one of the attorneys informed the court that pursuant to courthouse rumors suggesting improper jury conduct, he had asked his firm's investigator to interrogate jurors. The investigator talked to seven jurors and received a statement from one of them. On the basis of this investigation, a hearing was requested to inquire into the activities of one juror, Mr. Roy N. Hope. Over defendant's objections to such a proceeding, the hearing was set for April 10, 1970.

The April 10 hearing inquired into two specific subjects: (1) Whether Hope on the evening of April 2, 1970, when the jury \*\*421 was separated, rode in a car on three occasions and observed the area lit by the vehicle's headlights to ascertain the width of the area brightened, and whether he communicated his observations to the jury on April 3, 1970; and, (2) whether an acquaintance who, 3 months earlier, had struck a pedestrian at night had told Hope that it was impossible to see a pedestrian at nighttime crossing in front of a car, and whether Hope informed the jury of this discussion. On the first subject, Hope testified as follows:

'(By the Court) Q. Did you, after you had been selected as a juror on the Olberg case, make any tests with any automobile or automobiles?

**\*337** 'A. No, I did not.

'(By Mr. Hvass) Q. If you will just tell me about the lights, Mr. Hope.

'A. I took no test on Thursday evening. What I did was that I mentioned to the jury in the discussion back and forth with the many other comments on the part of many of them that I had an opportunity to be—to ride in a car three times Thursday evening and noting myself \* \* \* that I noticed when the lights were on dim that I could not see four lanes of traffic \* \* \*. I took no tests \* \* \*.

'Q. You told the jury with the lights on dim that you could not see across four lanes of traffic, is that correct?

'A. Right.'

Concerning the second area, the testimony was as follows:

'(By the Court) Q. Did you have an opportunity and use that opportunity after you were selected as a juror in the Olberg case to discuss a similar case with a man who had been involved in such similar case?

'A. There was a similar case that was mentioned as with him, as we were conferring in jury session downstairs, that is true.

'Q. \* \* \* (D)id you talk to any other person who had been involved in a similar case after you were selected as a juror on the Olberg case?

'A. No, I don't recall.

'(By Mr. Hvass) Q. Mr. Hope, at sometime did you discuss with a friend of yours who was the driver of an automobile involved in an accident with a pedestrian the question of what he could see with the lights of his automobile?

'A. I would say definitely no to that answer.

**\*338** 'Q. And you made no representation to any of the members of the jury that you had discussed an accident similar to the Olberg case with a friend of yours who swore that he could not see the pedestrian?

'A. No. State that question again.

'(By Mr. Hvass) Would you read it back, please?

'(Question read.)

'A. No.'

Plaintiffs filed a motion for a new trial alleging misconduct of the jury. Accompanying the motion were (1) an affidavit of Stanley W. Davies, plaintiffs' attorneys' investigator, stating that he had interrogated juror Bettie L. Silbernagel and six other jurors and that five of the six agreed with a written statement made by Mrs. Silbernagel, and (2) a statement of Mrs. Silbernagel reciting:

'\* \* \* (Mr. Hope) brought into the jury room information concerning a test he had conducted the night before in three separate vehicles. The purpose of the test was to ascertain how much distance and how wide a space the lights of the vehicle covered. It appeared to **\*\*422** me that Mr. Hope was trying to prove a point that on low beam there wasn't enough visibility to see more than one lane of travel. His indication to the Jury members was that you could only see straight in front of you. I don't

drive myself so I had to rely on what members of the Jury, such as Mr. Hope, who do drive, for much of my information. Mr. Hope cited a accident in which a person he knew had struck a pedestrian at night under similar circumstances and had sworn he hadn't seen the man.'

Oral argument on the motion was heard on May 1, 1970. During argument, plaintiffs' counsel presented to the court a statement by Robert Ray Doeden, a Richfield police officer, taken on February 15, 1970. The statement centered around a January 31, 1970, accident which Officer Doeden had investigated. In the accident James Andrew Guldseth had been driving a car which \*339 struck a pedestrian late at night. The Doeden statement contains the following interchange:

'Q. So then Guldseth had indicated to you that Mr. and Mrs. Roy Hope and Mr. and Mrs. Wayne Larson—did he say they had been dropped off prior to the accident?

'A. Yes. They apparently had been out to a church meeting that evening, these other two couples, and that he had been driving and that he had just left off these—Mr. and Mrs. Larson prior to this.'

The trial court then set May 11, 1970, for a hearing to examine the four jurors who had not been contacted by plaintiff.

At the May 11, 1970, hearing none of the jurors recalled a discussion of a prior accident. Three of the jurors testified as follows regarding Mr. Hope's driving observation:

(1) '\*\*\* (H)e did say that he had driven a car the night before and how the headlights—he had good vision with the headlights. \*\*\* I recall he did make that statement.'

(2) '\*\*\* (O)ne of the jurors stated that he had an opportunity to ride in three different cars the night before, and as he did so he observed how the headlamps shone on the highway.'

(3) 'Yes, a statement was made regarding driving a vehicle or different vehicles that evening.'

A fourth juror had no recollection of any such discussion.

On May 22, 1970, the trial judge ordered a new trial. Defendant contends that it was error to grant a new trial. It further maintains that it was error for the trial judge to consider the following evidence: (1) The testimony of the jurors concerning who said what in the jury room; (2) the Davies affidavit and the Silbernagel statement which it incorporated; and (3) the Doeden statement.

We reverse.

The central issue in this appeal is whether the trial court abused its discretion in granting a new trial on the grounds of jury misconduct. Incidental concerns include the admissibility \*340 of evidence which the trial court considered and the propriety of questioning jurors after the verdict to ascertain the existence of reversible misconduct.

11. Defendant contends that it was error for the trial judge to consider testimony of jurors as to who said what in the jury room. **As a general rule, evidence about matters which inhere in the verdict is not admissible. Thus, evidence of a juror's bias, motives, or beliefs should not be considered. The verdict as finally agreed upon and pronounced in court by the jurors must be taken as the sole embodiment of the jury's act.**<sup>1</sup>

\*\*423 23An exception to this general rule exists in the situation where the jury has disregarded certain formalities and is guilty of misconduct. See, 8 Wigmore, Evidence (McNaughton Rev.1961) ss 2352 to 2354. It is well established that evidence is admissible to show that a juror took an

unauthorized view or made an experiment.<sup>2</sup> Such misconduct, however, will only cause reversal when prejudicial.<sup>3</sup>

45 Although dicta to the contrary exists in several cases, the better rule seems to be that evidence of what was said in the jury room is admissible to show misconduct. It is artificial to allow such evidence from the offending juror or from jurors who observed misconduct outside the jury room,<sup>4</sup> but to exclude the \*341 evidence because the misconduct occurred within the jury room. In *State, by Lord v. Hayden Miller Co.*, 263 Minn. 29, 35, 116 N.W.2d 535, 539 (1962), we stated that the exclusion rule 'does not extend to statements of jurors who may have on voir dire concealed prejudice or bias which would have disqualified them Or to misconduct of a juror in making an independent inspection of the property in question contrary to the court's instructions.' (Italics supplied.) The trial court did not err in considering the testimony of Hope and the four other jurors questioned at the hearing because it was admitted for the purpose of showing misconduct of a juror.

Defendant contests the trial court's consideration of a number of items of evidence on the grounds that they are hearsay or were never admitted into evidence. We decline to rule on these matters because we believe that, even if it considered such evidence, the trial court erred in granting a new trial.

62. The first of the two grounds that the trial court relied upon in its order for a new trial is that while the jury was separated pursuant to [Rule 47.03, Rules of Civil Procedure](#), juror Hope had ridden in a car three times and had reflected on the width of the headlight beams and that he mentioned his observation to the other jurors. We do not believe that these facts merit a new trial. Casual observations taken while a juror is going about his ordinary business can be expected in many situations. It would be totally unrealistic to expect a juror, while out of the jury room, to purge his consciousness of any and all reflections upon the trial at hand—an event which to him is an extraordinary and rare occasion. A decision to that effect would make any trial judge or attorney reluctant to allow a [Rule 47.03](#) separation. We hold that a juror's conscious observation of the width of the headlight beams while on a journey incident to the juror's ordinary affairs during separation does not constitute misconduct. Nothing in this decision reflects upon the cases where a new trial was ordered because a juror made a deliberate inspection of an area to ascertain damages or to prove a witness' testimony. \*342<sup>5</sup> However, it should be noted that not every unauthorized view will overturn a verdict.<sup>6</sup>

**\*\*424 73. The second ground the trial court relied upon in granting a new trial was that juror Hope was biased due to his knowledge of a similar accident which befell an acquaintance. Mr. Hope was not asked any voir dire question which could be expected to elicit a response concerning the prior accident. A trial court is not justified in ordering a new trial simply because a peremptory challenge might have been exercised had the attorney elicited certain information on the voir dire examination. Verdicts are not so delicate as to be vulnerable to a post-trial voir dire under the circumstances in this case.<sup>7</sup>**

89 Moreover, evidence of this sort should not be admitted for the purpose of overturning a verdict. Many jurors will have personal experience with factual settings similar to the case in which they sit in judgment. To render their verdicts susceptible to impeachment on such grounds would be to expose all verdicts to constant attack founded only in speculation and conjecture. The trial court should not have considered evidence which only demonstrates that the juror knew someone involved in a similar accident and which, if discovered on voir dire, might have motivated the attorney for the plaintiff to exercise a peremptory challenge.

4. We have reversed this decision because the trial court abused its discretion by granting a new trial. The actions of plaintiffs' attorneys in questioning the jurors in no way affected the outcome.



Therefore, this is an appropriate place to set forth guidelines to follow in future litigation. We reiterate what we \*343 said in *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960):

\*\*\* (W)e are of the opinion that it is undesirable to permit attorneys or investigators for a defeated litigant to harass jurors by submitting them to interrogation of this kind without more protection for the ascertainment of the facts than appears in this case. We do not wish to encourage or approve the practice of so doing. **Cases may and do arise where a juror's untruthful answering of questions propounded upon a voir dire examination will prevent a litigant from having a fair trial.** Where such cases arise, and the facts come to light after the rendition of a verdict, some method of obtaining relief obviously should be available. However, rather than permit or encourage the promiscuous interrogation of jurors by the defeated litigant, we think that the better practice would be to bring the matter to the attention of the trial court, and, if it appears that the facts justify so doing, the trial court may then summon the juror before him and permit an examination in the presence of counsel for all interested parties and the trial judge under proper safeguards. If that were done, a situation such as we have here could not arise. A record then could be made which could be presented to this court if any doubt existed about the correctness of the trial court's ruling after such hearing.'

10The time that a verdict loser should approach the court to request a Schwartz hearing should be when the first suspicion of misconduct arises. Nothing should prevent the trial court from ordering a Schwartz hearing on the grounds of an oral assertion by counsel or hearsay affidavit.

11A defeated litigant's attorney should never interrogate a juror or telephone him for the purpose of gathering evidence for a request for a Schwartz hearing. Nor should an attorney have an investigator do this on his behalf. The trial \*\*425 courts should use their discretion and good judgment to prevent the necessity of such actions and should be liberal in granting a hearing.

\*344 12Many cases may arise where there is utterly no suspicion of jury misconduct. It may be argued that in such situations a Schwartz hearing is possible only after a juror has been contacted by the losing party. The answer to this argument is simply that attorneys should not be allowed to contact and harass jurors who render verdicts of a nonsuspicious nature.

13We do not feel that it is improper for attorneys to question jurors who take the initiative of approaching or telephoning the attorney to report what they consider misconduct.

It is hoped that this explanation of the Schwartz hearing will end the practice of attorneys contacting jurors in hopes of impeaching the verdict.

2. Abuse of discretion – every claim, and then you cite a ‘catch-all’ case, *State v. Duncan*, 608 N.W.2d 551 – get a new trial

-9 of them

Nothing

- a) Change of venue
- b) Pretrial publicity
- c) Failed to sequester jury
- d) Prosecutorial misconduct
- e) Failed to order Morris Hall to testify

-passenger in the car with George Floyd

-alleged drug dealer

-took the 5<sup>th</sup>

<https://www.wbal.com/article/509323/110/morries-hall-man-in-car-with-george-floyd-will-not-testify-in-derek-chauvin-murder-trial>

- f) Improper instructions on Murder 2, murder 3, and authorized use of force – literally pattern instructions
- g) Cumulative evidence as to the use of force – I have no idea what this is
- h) Treat witnesses as hostile and lead on direct
- i) Record of sidebars

## A. IP Feedback

## 1. AWW / Robert says:

During the intro to OA486, Andrew says you can't trademark a number. You can trademark a number! The United States Patent and Trademark Office (USPTO) has plenty of trademark registrations that consist solely of a number, in both the spelled out form (e.g., "SEVEN" - Registration #5759367) and in numeral form ("7" - Registration #3515960). Intel itself even applied for the trademark "486" (Application #73802060) and was approved by the USPTO! But Compaq filed an opposition to it because it owned the registration for the trademark "DESKPRO 386" (Registration #1459897) and Intel abandoned its application. However, Intel does own a registration for number in a similar vein, "I960" (Registration #1688872).

Andrew may have been thinking of not being able to trademark a "model number." As stated in the Trademark Manual of Examining Procedure (TMEP), the USPTO's manual on how to handle trademarks, model numbers may be considered to "fail to function as a mark," meaning consumers may not recognize this number as indicating the source of someone's goods, depending on how the number appears on the goods or packaging. (See TMEP § 1202.16)

**When we're riffing, there's a much higher chance I could be wrong.**

However, there are number of ways someone could still trademark a model number. One way is by claiming their trademark has acquired distinctiveness in the marketplace, called a Section 2(f) claim. This means they show evidence that consumers recognize the model number as an actual trademark, like providing evidence of consumer surveys or testimonials, advertising or sales figures, or unsolicited media coverage pertaining to the trademark. A good example is the "486" trademark -- when Thomas was talking about the number "486", Andrew (the consumer) understood right away that the model number pointed to Intel's processor, probably because of Intel's high volumes of advertising and sales, as well as media coverage of the 486 processor back in the day.

Yes, it may be difficult to trademark a number, but it's definitely possible.

As a final note, I will say that I appreciate Andrew correcting the record that "you can't *trademark* a number," as opposed to his first statement that "you can't *copyright* a number" and Thomas's statement that "you can't *patent* a number." As someone in the IP field I understand they are all easy to mix-up, but of course we all know they are VERY different rights. – **jail/prison** etc.

## 2. Sam Johnson asks:

Hi Andrew, I'd love for you guys to chat about the Ugg boot lawsuit, also known as Deckers Outdoor Corporation v. Australian Leather Pty Ltd, 1:16-cv-03676 (N.D.Ill.). It's about to come up on appeal I think.

**Yes – February verdict, some post-verdict motions, being briefed in the 7<sup>th</sup> Circuit.**

Ugg is a generic term here in Australia referring to any sheepskin boot. It was trademarked in the US by Deckers who has since enforced their trademark against a number of small Australian retailers. They are no longer allowed to do so in Australia due to a determination here, but they sue retailers in US courts based on them selling items online. It's hard to know what a cultural equivalent would be, but I think it would be like if a large Australian company trademarked 'Wiener' and started suing small US based frankfurter shops with an online presence. Might be a good opportunity to discuss some of the facets of trademark law, international/cultural complications, etc. Love your work as always.

True! But a lot more nuanced than you'd think

<https://openargs.com/wp-content/uploads/Ugg-lawsuit-final-order.pdf>

-stipulated that Deckers had a valid "UGG" trademark in the US (also "CARDY" – what's up with that?)

2 questions:

(1) was it "counterfeit" – "a spurious mark identical with or substantially indistinguishable from, a registered mark" Remember the test for infringement is "is likely to cause confusion, or to cause mistake, or to deceive"

(2) was it willful?

-jury said yes it was to both

-So you get to elect

15 U.S.C. 1117

<https://www.law.cornell.edu/uscode/text/15/1117>

-actual damages (3x if intentional)

-or "statutory" – court gets to pick a number

**(c) Statutory damages for use of counterfeit marks** In a case involving the [use](#) of a [counterfeit mark](#) (as defined in [section 1116\(d\) of this title](#)) in connection with the sale, offering for sale, or distribution of goods or services, the plaintiff may elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits under subsection (a), an award of statutory damages for any such [use](#) in connection with the sale, offering for sale, or distribution of goods or services in the amount of—

**(1)** not less than \$1,000 or more than \$200,000 per [counterfeit mark](#) per type of goods or services sold, offered for sale, or distributed, as the court considers just; or

**(2)** if the court finds that the [use](#) of the [counterfeit mark](#) was willful, not more than \$2,000,000 per [counterfeit mark](#) per type of goods or services sold, offered for sale, or distributed, as the court considers just.

\$450,000

-weirdness about international IP rights, differential laws, etc. – Robotech next week

## B. Robotech, the Italian Donald Trump Transformers, and intellectual property

-so you know I'm a transformers fan

-concept originated in Japan, where they were called 'mecha'

-Transformers has a relatively simple origin: the stories were created by a teaming effort between Marvel (comics) and Sunbow productions (TV), and they bought up the US license to basically all the physical transforming toys they could find in Japan. They principally came from two different lines – Diaclone, which did most of the vehicles, and a line called Micro Change, which had household objects like cassette player, microscope, and you know, a realistic-looking Walther P-38 handgun. Later they added things like robot dinosaurs from the Diaclone Dinosaur Robo line.

-Why would a tape player be fighting a robotic T-rex? Never bothered us as kids.

Put a pin in it, because I want to talk about a different transforming robot property from the 1980s because it gave rise to the weirdest IP dispute of all time.

Around 1980, three companies were involved in the Japanese production of a manga: Big West Advertising Co., Ltd, an ad agency; Studio Nue, which was an art design studio affiliated with Big West, and Tatsunoko Production Co., Ltd., which was an animation studio. So Studio Nue created a story, Big West financed it, and Tatsunoko made the animation. That story was called "Super Dimension Fortress Macross," and it was basically an animated soap opera in space with transforming mecha. So far, so good.

Now, Tatsunoko had been making anime since the 1960s, and they'd previously licensed Speed Racer to the US, which was one of the first successful Japanese anime run in the US. Here's how they were paid: they received the rights to the physical animation of the original *The Super Dimension Fortress Macross* anime (but not characters, concepts, designs, etc.) as well as the rights to distribute the anime series—and related merchandise—outside of Japan.

And this is the point where we enter the Italian Donald Trump, former Prime Minister Silvio Berlusconi. He's a multi-billionaire, and like Trump, he got that way by lying, cheating, committing crimes, and not giving a damn about conflicts of interest. Specifically, he owns – he still owns – a company called Mediaset –it's the largest commercial broadcast company in Italy and it in turn owns three of the seven network TV channels in Italy. So, right: he blanketed the airwaves with ads.

Berlusconi promised to give up his interests in Mediaset if he won. You may have noticed that even though he won in 1994, he never did. Instead, he used that ownership to bully other networks, get journalists fired, clamp down on the press, you know, all the stuff Trump wishes he could do.

Berlusconi's friend, an Egyptian named Frank Agrama. At the time, he made low-budget movies like *Dawn of the Mummy*. But thanks to his connections, he sold various Paramount Pictures rights to Mediaset. He used the money he made off of that deal to start a company called Harmony Gold. And Harmony Gold went to license *Super Dimension Fortress Macross* to air in the US. Because Agrama was actually, as far as I can tell, pretty smart, and he realized that the whole "transforming robots" thing was about to be a big deal. But there was a problem.

The problem was US syndication. There were only 36 episodes of *Macross*, and to syndicate a cartoon in the US at the time, you needed a minimum of 65 episodes – 5 per week, 13 weeks for a season.

Here's the decision that caused all the problems. Harmony Gold bought the rights to *Macross* and two other Tatsunoko productions: *Super Dimension Calvary Southern Cross* (23 episodes) and *Genesis Climber Mospeada* (25 episodes), and they hired a writer named Carl Macek to stitch them all together. They made one clip show episode, bam, 85 episodes, hello syndication.

**I cannot stress this enough – all three of these shows were completely different. Different characters. Looked different.** The only thing they had in common is they were produced by the same studio, Tatsunoko and they were all three science fiction transforming robot mecha. It would be like taking three different Pixar movies – *Frozen*, *Toy Story*, and *The Incredibles*?

But they did that, and they called it *Robotech*. And you know what, it was a hit, and Carl Macek is today credited with basically singlehandedly kicking off the interest in anime in the U.S. And basically if you're my age, and you grew up with *Robotech*, you loved it, but if you're younger, you're in the music-on-vinyl crowd, and you're like "psssh, they totally ruined *Macross*." Put a pin in that.

Anyway, in the US Harmony Gold partnered with Matchbox to make the toys. And here's the toy they wanted to start with – the Veritech. See, the primary hero of *Robotech* is a young fighter pilot named Rick Hunter, it's kind of a *Top Gun* in space. And he flies this transforming jet, in *Macross* it was called a Valkyrie, in *Robotech*, a Veritech.

Remember that Tatsunoko could license toys overseas, but Big West and Studio Nue retained the rights to license toys domestically in Japan. And so they had already licensed the Valkyrie in 1983 to a company called Takatoku, which sold a million units in Japan... and Takatoku then licensed it to Hasbro for the Transformers in 1984.

You can see the US patent here as "changeable robot toy" – <https://patents.google.com/patent/USD287037S/en>

So Hasbro and Harmony Gold tried to figure out what the hell was going on. And here's the thing: *nobody knew*. Harmony Gold probably really didn't want to sue Hasbro. But Hasbro also wasn't interested in investing a ton into legal fees at this point. So they reached a private settlement, here's what happened in the US:

- Hasbro would continue to sell the Jetfire toy, which looked exactly like the *Macross* Valkyrie
- BUT Transformers would change the character's name to "Skyfire," and completely change his appearance on-screen so it no longer resembled the toy they were selling in the stores, which was very weird for kids.
- Meanwhile, Harmony Gold would air *Robotech*, featuring the on-screen depiction of the Valkyrie
- Harmony Gold could sell other toys based on *Macross*, but not the Valkyrie

So think of how weird that is. You have a toy that looks like the thing from *Robotech*, but it's sold under the Transformers logo. And then if you bought it as a Transformer, you would watch the TV show and wonder if it was the same character.

And Matchbox was like, “hey, what do you want us to do?” And so – and this is the weirdest thing I have ever seen as a business decision – Harmony Gold was like, “well, let’s make action figures of the characters on the show.” And by the way, like half the main characters were women, so there were also Barbie-like accessories.

So unlike basically every other popular show from the 1980s, *Robotech* did not exist to sell Robotech toys. You *couldn't buy transforming toys*, even though that was the whole reason they were brought over in the first place. So *Robotech* was super popular as a show but wasn't making any money as a property.

So what can you do?

Tatsunoko's numerous licensing agreements granted a fairly broad reach on what could be done with the *Macross* license. The original 1984 agreement allowed Harmony Gold to do the following: **[...] present, reproduce, record, publish, release, exhibit, distribute, perform, broadcast, diffuse, display, market, edit, dub, translate, arrange musically, transform, dramatize and otherwise adapt and prepare derivative works, based on, advertise, and otherwise dispose of and exploit the underlying series, and any and all versions, character, stories, setting, titles, music, sound track and effects, animation, artwork and all other components thereof, using any methods or devices of exploitation. .**

So the thought was: why not develop a sequel? And they tried and fucked up a couple of times. Harmony Gold tried to turn another anime called *Megazone 23* into a *Robotech* movie, and... it just was a disaster. And by now it was the late 80s, and the transforming robot craze was over, and by the way, the exchange rate dropped precipitously – from 250 yen to the dollar in 1985 to 120:1 by 1987. In other words, it was now twice as expensive to source stuff from Japan.

So Harmony Gold thought, well, they'll just make their own *Robotech*, with hookers and flapjacks. But Matchbox pulled out as a partner and basically there wasn't any money left. Harmony Gold made money selling stuff to Silvio Berlusconi but basically they had this license and nothing to do with it. PIN.

...

In Japan, it was a different story. Not only was *Macross* popular as a show, but popular selling the toys. And so Studio Nue and Big West – remember them? – made a whole bunch of *Macross* sequels, movies, video games, etc.

The franchise spawned three more television series ([Macross 7](#), [Macross Frontier](#), and [Macross Delta](#)), several theatrical films (starting with [The Super Dimension Fortress Macross: Do You Remember Love?](#)), and several video series (including [Macross II](#), [Macross Plus](#), [Macross Dynamite 7](#), and [Macross Zero](#)).

In the 1990s, anime went mainstream in the US with *Sailor Moon*, *Dragon Ball Z*, and of course, *Pokemon*. So all of a sudden people were very interested in seeing not just the original *Macross*, *Southern Cross*, and *Genesis Climber Mospeada* – but all the sequels.

Harmony Gold said ‘no fucking way.’ If you have an asset (a licensing agreement) but no income stream, you... sue people you think are infringing on that agreement. And they did, all over the place.

2003 case in Japan:

[https://www.ip.courts.go.jp/app/files/hanrei\\_en/013/002013.pdf](https://www.ip.courts.go.jp/app/files/hanrei_en/013/002013.pdf)

-Big West/Studio Nue v. Tatsunoko – who owns derivative rights?

2017 arbitration - lawsuit

[https://scholar.google.com/scholar\\_case?case=13613987763006822039&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=13613987763006822039&hl=en&as_sdt=6&as_vis=1&oi=scholar)

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#### 1. Declaratory and other Relief Granted in favor of Claimant

- a. To the date hereof Claimant has not materially breached any agreements with Respondent related to the Programs nor infringed any of Respondent's rights therein including but not limited to infringing on Respondent's copyrights or fraudulently registering *Macross* trademarks;
- b. The Original Agreements and Operative Agreements grant Claimant the right to make derivative works of the Programs and *Robotech*, including live action motion picture adaptations, and Claimant has not produced any unlicensed works;
- c. The 2003-A is valid and binding on Respondent, and Claimant has been granted therein all of Respondent's copyright rights in *Macross*, except for the visual depiction of the original 41 animated graphic characters from the underlying Program, pursuant thereto;
- d. The Operative Agreements grant Claimant the express right to sublicense its rights as it chooses, and Claimant has neither breached said agreements nor infringed on Respondent's rights by entering into such sublicenses;
- e. The Operative Agreements grant Claimant the express right to exploit the Programs and any derivative works in all media, including digital, and Claimant has not breached said agreement nor infringed on Respondent's rights by exploiting the Programs and related derivative works in digital media;
- f. The Operative Agreements grant Claimant the right to exploit the Programs and any derivative works through sublicensing of music and clips, and Claimant has neither breached the agreement nor infringed on Respondent's rights by exploiting the Programs and related derivative works through such sublicenses;
- g. Claimant owes no royalties for home video exploitation pursuant to the 1991-LA as same are part of the flat license fee for visual rights;
- h. Claimant had and has the right to offset against royalties otherwise owed to Respondent the sum of \$541,362 incurred by Claimant in connection with the Big West litigation, until recouped;
- i. To the date of the last royalty statement or audited date, Claimant has fully accounted for all royalties owed to Respondent except for the amount of \$42,543 which Claimant is to account for and/or to pay to Respondent forthwith subject to any continuing proper offsets.



j. Respondent's audit and other claims, as are identified in the body hereof and in Respondent's request for relief, are time barred as they arise out of claims more than four years old for its breach of contract claims, and more than three years old for its copyright claims;

k. As of this date, Respondent is not entitled to terminate the Operative Agreements or otherwise curtail Claimant's rights thereunder.

l. Claimant owns in perpetuity the title Robotech and the produced *Robotech* programs with exploitation thereof subject to Respondent's rights on termination of the Operative Agreements.

-Transformers made a zillion, billion dollars – Sony licensed Robotech from Harmony Gold and said “figure this out”

They did

2021 agreement text

<https://www.denofgeek.com/tv/macross-sequels-and-films-to-be-released-worldwide-by-big-west-and-harmony-gold-exclusive/>

*“Tokyo based BIGWEST Co. LTD. and Los Angeles based Harmony Gold U.S.A. announced an agreement regarding the worldwide rights for the legendary Macross and Robotech franchises. This expansive agreement signed by both companies on March 1, 2021, ends two decades of disagreements and will allow Big West and Harmony Gold to chart a new path that will unlock the great potential of both the Macross and Robotech franchises worldwide.*

*The landmark agreement immediately permits worldwide distribution of most of the Macross films and television sequels worldwide, and also confirms that Big West will not oppose the Japanese release of an anticipated upcoming live-action Robotech film. The agreement also recognizes Harmony Gold’s longstanding exclusive license with Tatsunoko for the use of the 41 Macross characters and mecha in the Robotech television series and related merchandise throughout the world excluding Japan.*

*Moving forward, both parties will cooperate on distribution regarding future Macross and Robotech projects for the benefit of both franchises.”*

This is a major shift for the **Macross** franchise in the west. For years fans outside of Japan have been clamoring for official releases of the **Macross** sequels and films and now they’ll be getting most of them! The press release doesn’t mention which sequels and films will be excluded so stay tuned for more information on that as it becomes available.

The press release also contains the fascinating tidbit that Big West won't oppose a Japanese release of the upcoming live-action *Robotech* film. Hopefully ironing that out removes one of the road blocks in that film moving forward.

Big West representative director, Kaya Onishi said in a statement, “stories that feature Valkyries, a transformable realistic mecha, in action among the galaxies while diva’s sing in the background, as well as love triangles involving the pilots and singers. That was and continues to be the concept behind the Macross series, and I am happy that I can now help bring Macross to people all over the world on the 40th anniversary of the series. I would like to express my deepest gratitude to Harmony Gold Chairman, Frank Agrama for his courageous decision in this matter.”

Haromy Gold USA chairman, Frank Agrama adds, “this is an incomparably historic moment for both Harmony Gold and Big West and the anime industry overall. This is also an exciting moment for fans of Robotech and Macross worldwide. I thank my friend, Big West Representative Director, Kaya Onishi for her hard work to help us reach this long-desired resolution that protects both of our franchises while building a better tomorrow for both our companies.”

C. A lot of pieces are moving in Sidney Powell's world

1) Why we cover this –

<https://sciencebasedmedicine.org/covid-vaccine-manufacturers-should-explore-legal-action-against-anti-vaxxers-spreading-disinformation/>

Our buddy Steve Novella, basically that these lawsuits are a way of handling disinformation campaigns – enlist corporations in the fight – Pfizer/Moderna/Bill Gates should sue the fuck out of outlets spreading disinfo.

2) Newsmax apology and retraction

Case no D162020CV34319

<https://www.courthousenews.com/wp-content/uploads/2020/12/Trump-1222.pdf>

(state court in Colorado – status conf. set for 5/27)

By Eric Coomer, he's the Director of Security for Dominion  
Sued everybody - DONALD J. TRUMP FOR PRESIDENT, INC., SIDNEY POWELL, SIDNEY POWELL, P.C.,  
RUDOLPH GIULIANI, JOSEPH OLTMANN, FEC UNITED, SHUFFLING MADNESS MEDIA, INC. dba  
CONSERVATIVE DAILY, JAMES HOFT, TGP COMMUNICATIONS LLC dba THE GATEWAY PUNDIT, MICHELLE  
MALKIN, ERIC METAXAS, CHANEL RION, HERRING NETWORKS, INC. dba ONE AMERICA NEWS NETWORK,  
and NEWSMAX MEDIA, INC.,

Key to that allegation:

Paragraph 5-7 – podcaster named Joseph Oltmann – and he just made up a “conference call” with Antifa. Oltmann claimed on this call he purportedly heard someone identified as “Eric from Dominion,” and that this “Eric” stated he would ensure the election went to President-Elect Biden. Oltmann provided no explanation for how he learned of this purported call or gained access to it. Oltmann acknowledged he has no recording of it and indicated he had no knowledge of the participants he referenced within it. Rather, Oltmann's dubious claims are premised on one unverified speaker referring to another. With no legitimate attempt to confirm the identity of these alleged speakers, Oltmann attributed their alleged statements to Dr. Coomer. With no additional evidence, Oltmann then used these statements to falsely assert that Dr. Coomer subverted the results of the election. Defendants seized on and perpetuated these false allegations to further their own interests.  
Sidney Powell TO THIS DAY repeats claims about Coomer.

Led to two retractions by Newsmax

First was before the lawsuit was filed (12/19/20), not sufficient, hard to find  
“Facts About Dominion, Smartmatic You should Know”

<https://www.newsmax.com/us/smartmatic-dominion-voting-systems-software-election/2020/12/19/id/1002355/>

1. We have no evidence Dominion uses Smartmatic's software or vice versa.

2. No evidence has been offered that Dominion or Smartmatic used software or reprogrammed software that manipulated votes in the 2020 election.
3. Smartmatic has stated its software was only used in the 2020 election in Los Angeles, and was not used in any battleground state contested by the Trump campaign and Newsmax has no evidence to the contrary.
4. Dominion has stated its company has no ownership relationship with the House Speaker Nancy Pelosi's family, Sen. Dianne Feinstein's family, the Clinton family, Hugo Chavez, or the government of Venezuela.
5. Neither Dominion nor Smartmatic has any relationship with George Soros.
6. Smartmatic is a U.S. company and not owned by the Venezuelan government, Hugo Chavez or any foreign official or entity.
7. Smartmatic states it has no operations in Venezuela. While the company did election projects in Venezuela from 2004 to 2017, it states it never was founded by Hugo Chavez, nor did it have a corrupt relationship with him or the Venezuelan government.

Second was a couple of days ago, much more specific

**DO GO TO THIS ADDRESS**

<https://www.newsmax.com/newsfront/eric-coomer-dominion-voting-systems/2021/04/30/id/1019671/>

1. Newsmax would like to clarify its coverage of Dr. Coomer and note that while Newsmax initially covered claims by President Trump's lawyers, supporters and others that Dr. Coomer played a role in manipulating Dominion voting machines, Dominion voting software, and the final vote counts in the 2020 presidential election, Newsmax subsequently found no evidence that such allegations were true. Many of the states whose results were contested by the Trump campaign after the November 2020 election have conducted extensive recounts and audits, and each of these states certified the results as legal and final.
2. Newsmax has found no evidence that Dr. Coomer interfered with Dominion voting machines or voting software in any way, nor that Dr. Coomer ever claimed to have done so.
3. Nor has Newsmax found any evidence that Dr. Coomer ever participated in any conversation with members of "Antifa," nor that he was directly involved with any partisan political organization.

On behalf of Newsmax, we would like to apologize for any harm that our reporting of the allegations against Dr. Coomer may have caused to Dr. Coomer and his family. For more on this, please go to our website at Newsmax.com, and read "Facts About Dominion, Smartmatic You Should Know."

3) How does that affect the Dominion defamation lawsuit?

<https://context-cdn.washingtonpost.com/notes/prod/default/documents/1d2fd01e-de09-473d-9997-0523f7797c65/note/633a5729-658e-409a-b9a0-79490fddb2e1.#page=1>

Sidney Powell is defending, piecemeal, her statements. She still defends claims about Coomer in her motion to dismiss that lawsuit

<https://ecf.dcd.uscourts.gov/doc1/04518405665>

p. 38-39: “In fact, as Plaintiffs’ own Director of Product Strategy and Security, Dr. Eric Coomer, admitted under oath, “all computers can be hacked with enough time and access[.]” Curling, 2020 U.S. Dist. Lexis 188508, at \*47 (emphasis supplied).”

Dominion has responded:

<https://ecf.dcd.uscourts.gov/doc1/04518495417>

-contradiction between “no, this is just opinion” and “I believe it”

Intro page xi

After proclaiming that “I can hardly wait to put forth all the evidence we’ve collected on Dominion, starting with the fact it was created to produce altered voting results in Venezuela for Hugo Chávez,” that “votes were in fact altered and manipulated” “in the 2020 US General Election,” and that “you would have to be a damn fool and abjectly stupid not to see what happened here, for anybody who’s willing to look at the real evidence,” Powell now claims that “no reasonable person would conclude that the statements were truly statements of fact.” (p. 27-28). At the same time, Powell asserts that she herself “believes them now.” (Id. at 37.)

Outside of the legal quirks, the two main issues are

- 1) Are these statements of fact
- 2) Have they alleged actual malice

YES

p. 3

- Dominion’s founder admitted on video that “he can change a million votes, no problem at all.” (Compl. ¶ 181(j).)
- She had collected “evidence” “on Dominion, starting with the fact it was created to produce altered voting results in Venezuela for Hugo Chávez and then shipped internationally to manipulate votes for purchase in other countries including this one.” (Id. ¶ 181(e).)
- “We have mathematical evidence in a number of states of massive quantities of Trump votes being trashed.” (Id. ¶ 181(k).)
- Dominion “weighted votes for President Trump at .77% and they awarded votes to Biden at something like 1.22%.” (Id. ¶ 181(s).)
- Dominion “automatically flipped approximately 2.7% of the vote to Biden.” (Id.)
- Dominion’s voting systems were “designed to enable those sorts of vote flipping and switching and the ability to trash votes in large numbers so that Mr. Biden would win without campaigning.” (Id.)
- Dominion switched “350,000” votes to Biden “all of a sudden at 3 o’clock in the morning.” (Id. ¶ 181(v).)
- Dominion’s algorithm made “a Biden vote count 1.26 and a Trump vote count only .74.” (Id. ¶ 181(ii).)
- A hand recount confirmed that Dominion “weighted Biden votes at 1.52 and they weighted Trump votes at .48 when the votes went into the machine to change them.” (Id. ¶ 181 (u).)
- “We’re collecting evidence now from various whistleblowers that are aware of substantial sums of money being given to family members of state officials who bought this software.” (Id. ¶ 181 (g).)

Under Supreme Court precedent that Powell herself cites, Powell's statements are plainly actionable because they are "susceptible of being proved true or false" and "a reasonable factfinder could conclude" that they state or imply an assertion of fact.

Actual malice – did they know or have reason to know? Newsmax recanting can bear on that

#### 4) Wisconsin attys' fees

Remember the three main arguments made by Gov. Evers: (1) a motion to strike doesn't do what you think it does, (2) your time argument doesn't answer the inherent sanctions power of the court, and (3) those sanctions are not just predicated on how bad your arguments are, they're also based on the fact that you suck as a lawyer

It's now fully briefed as of yesterday.

POWELL HAS REPLIED AND SHE'S SO OBLIVIOUS

-reply in support of Motion to Strike

<https://openargs.com/wp-content/uploads/2021.04.19-Powell-Reply-Mem-Sup-Mtn-to-Strike.pdf>

totally missed the point

-opp Sanctions

<https://openargs.com/wp-content/uploads/2021.04.21-Powell-Opp-Sanctions.pdf>

-just cobbled together nonsense

-Clarence Thomas stuff – this is really dangerous (p. 7-8)

EVERS REPLY BRIEF

<https://openargs.com/wp-content/uploads/2021.05.06-Evers-reply-brief.pdf>

-remember that it wasn't just Spyderys and Terpsichores, it was also that "these guys are super bad at being lawyers." Put a pin in THAT for sure.

DID what we said they would – used how bad Sidney Powell's responses are as continuing evidence for why they deserve sanction; p. 2 fn 1

Since Governor Evers filed his fee motion, Plaintiff and his attorneys have put forth an improper motion to strike (see Dkt. 105). They have failed to abide by Local Civil Rule 7(j)(2), when they neglected to provide a copy of unpublished decisions cited in support of their opposition to Governor Evers's fees motion (Dkt. 109 at 7, 13, 17). These are minor offenses but of a piece with the careless, haphazard way they have litigated this matter from the get-go

**T3BE 226**

-Second chance B/D

-what's a designated representative?

-I did not know this rule applied in a criminal case

FRE Rule 615

[https://www.law.cornell.edu/rules/fre/rule\\_615](https://www.law.cornell.edu/rules/fre/rule_615)