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People v. Givenni

Colette Siesholtz
New York Law School

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COLETTE SIESHOLTZ

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ABOUT THE AUTHOR: Colette Siesholtz is a 2012 J.D. candidate at New York Law School.

I. INTRODUCTION

A popular comedic television character, Michael Scott of *The Office*, once absurdly stated, "Wikipedia is the best thing ever. Anyone in the world, can write anything they want about any subject. So you know you are getting the best possible information."[1] While the statement is largely false, though funny, Michael Scott seemed sadly unaware of the paradox of his statement. Wikipedia, the world's largest online collaborative encyclopedia, is "user generated," meaning that anyone with Internet access can "create or edit" an article on any topic regardless of their knowledge or expertise in the subject.[2] Wikipedia was created in 2001 by Jimmy Wales, and as of February 2012, had over 3,863,083 English articles available online.[3] Though it may prove to be an efficient source for quickly gaining general information, Wikipedia lacks the reliability necessary for the citation of central facts in judicial opinions.

In *People v. Givenni*, the New York County Criminal Court held, in a case of first impression, that helium is a "noxious material" under New York Penal Law (NYPL) section 270.05, which prohibits the unlawful possession or sale of a noxious material.[4] The court denied the defendants' motion to dismiss the accusatory instrument for facial insufficiency.[5] In support of its conclusion, the court primarily cited to information about helium found on Wikipedia. It also cited to New World Encyclopedia, an online encyclopedia similar to Wikipedia, and to information appearing on the website of Lenntech Water Treatment and Air Purification ("Lenntech").[6] The court relied on citations to these two online encyclopedias and Lenntech's website to ascribe to helium the characteristics that allowed it to be categorized as a "noxious material" under section 270.05.[7]

This case comment contends that citing and relying on sources like Wikipedia, i.e., user-edited online encyclopedias, for substantive support is problematic because doing so establishes unreliable precedent and can lead to flawed legal analysis. This is especially problematic in cases of first impression because they become the foundation for novel legal issues and flaws in the court's reasoning can have a lasting negative impact on future cases that address similar issues. Tolerating the citation of such sources implies that the use of unreliable sources in support of legal

1. Tac Anderson, *Wikipedia is the Best Thing Ever!*, @NewCommBiz (Apr. 10, 2007, 5:15am), http://www.newcommbiz.com/wikipedia-is-the-best-thing-ever/ (citing *The Office* (NBC)).

2. *Definition of: Wikipedia*, PCMag, http://www.pcmag.com/encyclopedia_term/0,2542,t=Wikipedia&i=54463,00.asp (last visited Feb. 22, 2012) [hereinafter PCMag]; *see also* Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 Yale J.L. & Tech. 1, 4 (2009–10).

3. PCMag, *supra* note 2; *see also* Wikipedia, http://en.wikipedia.org/wiki/Main_Page (last visited Feb. 3, 2012). The main www.wikipedia.org page also displays other languages of Wikipedia articles as well as the approximate number of articles in each language. *See id.*

4. *Id.* 898 N.Y.S.2d 829, 832–33 (Crim. Ct. N.Y. County 2010).

5. *Id.* at 833.

6. *Id.* at 832.

7. *Id.*

determinations is proper for later courts. In reality, the use of unreliable sources can adversely affect decisions and the parties' interests by basing legal conclusions on substantively inaccurate facts or, worse, assertions masquerading as facts, including those that can be edited by anyone at anytime.

This case comment analyzes the use of Wikipedia in *Givenni* and contends that the court inappropriately relied on Wikipedia to determine that helium is a noxious material under NYPL section 270.05. First, this case comment reviews cases decided by New York state courts and the Second Circuit and argues that these cases establish that courts should use Wikipedia pages only as "collateral references," i.e., references that do not influence a court's holding. Courts' use of Wikipedia as a primary reference sets a dangerous precedent for the use of Wikipedia in future court decisions. Second, this case comment analyzes the use of Wikipedia in cases of first impression outside of the Second Circuit. Cases of first impression are uniquely problematic because they serve as the foundation for legal determinations that will be applied in future cases.

Michael Givenni, David Clark, and Kevin Cunningham sold helium balloons at a Phish concert at Madison Square Garden in December 2009.[8] They filled balloons with helium from four helium tanks and sold them to individuals who would then inhale the helium from the balloons.[9] Givenni, Clark, and Cunningham were each charged with a Class B Misdemeanor for unlawfully possessing and selling a noxious material under NYPL section 270.05.[10] Section 270.05 prohibits a person from possessing or selling noxious material.[11] Noxious material is defined as "any container which contains any drug or other substance capable of generating offensive, noxious or suffocating fumes, gases or vapors, or capable of immobilizing a person."[12] The statute provides in relevant part that

> [a] person is guilty of unlawfully possessing noxious material when he possesses such material under circumstances evincing an intent to use it or to cause it to be used to inflict physical injury upon or to cause annoyance to a person, or to damage property of another, or to disturb the public peace.[13]

The mere "[p]ossession of noxious material is presumptive evidence of intent to use it or cause it to be used in violation of [the statute]."[14] The arresting police officer, who had training and experience with noxious materials, testified that he inspected the

8. *Id.* at 831; *see also* Daniel Wise, *Judge Finds Helium 'Noxious' Substance Under Penal Law*, 243 N.Y. L.J. 2 (Apr. 23, 2010).

9. *Givenni,* 898 N.Y.S.2d at 831; *see also* Wise, *supra* note 8.

10. *Givenni,* 898 N.Y.S.2d at 831; *see also* Wise, *supra* note 8.

11. N.Y. Penal Law § 270.05(1) (McKinney 2011).

12. *Id.* § 270.05(2)–(6).

13. *Id.* § 270.05(2).

14. *Id.* § 270.05(3).

helium tanks and believed the canisters contained a noxious material based on the characteristics of their packaging.[15]

The defendants filed motions to dismiss the indictment for facial insufficiency.[16] Lance Fletcher, the attorney representing Michael Givenni, relied on *In re John M* in his motion to dismiss the case in order to demonstrate the lack of the requisite intent under NYPL section 270.05. *In re John M* was a case in which a Queens Family Court judge held that "possession of glue in a bag" was "not a crime under the noxious material" statute and "sniffing glue from a paper bag" could not "be prosecuted as a crime."[17] Mr. Fletcher argued that helium was not harmful to the general public and not toxic when inhaled by an individual (unlike certain glues).[18] Mr. Fletcher stated that the mere possession of helium did not satisfy NYPL section 270.05(2) because there was no intent to use it to inflict physical injury.[19] However, the *Givenni* court held that the charge of unlawfully possessing or selling a noxious material was facially sufficient under NYPL section 270.05 based on the statute's legislative intent to prohibit the possession of "certain chemical sprays which temporarily immobilize a person."[20] The court reasoned that any substance, including tear gas and gas bombs, that temporarily immobilizes a person is proscribed under NYPL section 270.05.[21] After determining that helium can temporarily immobilize someone, the court held that the charge was facially sufficient.

In making this determination, the court relied on explanations of helium's characteristics from Wikipedia, New World Encyclopedia, and Lenntech.[22] The court relied upon Wikipedia for its definition of helium as a "colorless, odorless, tasteless, non-toxic, inert monatomic gas that heads the noble gas group in the periodic table."[23] An additional citation to Wikipedia provided that inhalation of helium from pressurized cylinders can be extremely dangerous and can rupture lung tissue, a condition known as barotraumas. These dangerous results were deemed to

15. *See Givenni,* 898 N.Y.S.2d at 831 ("[D]eponent . . . examined the above-described canister and believe[d] said canister contain[ed] a noxious material, based upon information and belief, the source of which is as follows: (i) deponent's professional training and experience as a police officer in the identification of noxious materials, and (ii) observation of the packaging which is characteristic of a noxious material.").

16. *Id.*

17. Wise, *supra* note 8 (discussing Judge Saul Moskoff's holding in *In re John M.*, 318 N.Y.S.2d 904 (N.Y. Fam. Ct. 1971), that the noxious material law was meant to proscribe materials that posed a danger to the general public and holding that glue in a bag only posed danger to the individual user and not the general public).

18. Notice of Omnibus Motion at 4, People v. Givenni, 898 N.Y.S.2d 829 (Crim. Ct. N.Y. County 2010) (No. 2009NY093088).

19. *Id*. at 5.

20. *Givenni*, 898 N.Y.S.2d at 832 (internal quotation marks omitted) (citing William Donnino, Practice Commentaries, McKinney's Cons. Laws of N.Y., Bk. 33, P.L. § 270.05 (2008)).

21. *Id.*

22. *Givenni*, 898 N.Y.S.2d at 832–33.

23. *Id.* at 832 (citing *Helium,* Wikipedia, http://en.wikipedia.org/wiki/Helium).

support the court's finding that excessive inhalation of helium could in fact immobilize a person.[24]

The court relied on New World Encyclopedia to find that excessive helium inhalation is dangerous because helium displaces oxygen that is needed for respiration and, as a result, can cause asphyxiation.[25] Lastly, the court cited to the Lenntech website, a Netherlands-based water treatment company, for the assertion that helium, when uncontained, can cause "suffocation by lowering the oxygen content of the air in confined areas."[26] While it is unclear why this source was used, no representative from Lenntech testified as an expert witness in the case.[27]

Based on the above definition of helium and descriptions of its attributes, derived primarily from Wikipedia along with New World Encyclopedia and the Lenntech website, the court held that helium is a "noxious material" for the purpose of section 270.05 because "[i]t is capable of generating noxious or suffocating fumes and it can immobilize a person upon excessive inhalation."[28] Furthermore, the court held that the defendants could properly be charged with unlawfully possessing or selling a noxious material because possession of a noxious substance is "presumptive evidence of intent to use it in violation of the statute."[29]

This case comment contends that courts should only rely upon information from Wikipedia and other user-authored online encyclopedias for contextual information that is not essential to the court's analysis or determinations central to the court's reasoning or holding. Courts should not use these online tools as primary references because unknown individuals author the content (i.e., anyone with a computer). These sites have little to no oversight by experts in the field, creating a question as to the reliability of the information. Before a court may rely on Wikipedia in its opinion, the court should determine the following: (1) whether the citation to Wikipedia is for background information, solely providing the reader a contextual understanding; (2) whether a more reliable or authoritative source exists; and (3) whether the citation to Wikipedia is used for an essential factual definition or legal determination that is central to the court's analysis of the issue, reasoning, or holding.[30]

This case comment proceeds by first discussing the use of Wikipedia by New York state courts and the Second Circuit, specifically their trend of limiting the use

24. *See id.* at 832 ("[i]nhaling helium directly from pressurized cylinders is extremely dangerous, as the high flow rate can result in barotrauma, fatally rupturing lung tissue" (citing *Helium*, Wikipedia, http://enwikipedia.org/wiki/Helium)).

25. *See id.* ("Although 'neutral helium at standard conditions' should not pose a health risk, excessive inhalation of the gas can cause asphyxiation." (citing *Helium*, New World Encyclopedia, http://www.newworldencyclopedia.org/entry/Helium)).

26. *Id.* (citing *Helium-He*, Lenntech, http://www.lenntech.com/periodic/elements/he.htm).

27. Telephone Interview with Anthony Bailey, Esq., Of Counsel, The Law Office of Gilda M. Bailey, P.C. (July 1, 2011) (on file with the author).

28. *Givenni*, 898 N.Y.S.2d at 832.

29. *Id.*

30. *See* Peoples, *supra* note 2, at 28–36.

of Wikipedia to so-called "collateral references."[31] Second, this case comment analyzes the similar use of Wikipedia in cases of first impression from various jurisdictions. Cases of first impression represent a unique category of cases in that they establish new rules and are the foundation for analysis in subsequent cases, running the risk of creating bad law.[32]

Other New York state and federal courts have cited to Wikipedia in varying contexts for the purpose of providing general background information that is contextually helpful to the reader. This type of background information is known as a "collateral reference."[33] A collateral reference is not relied on for citations to a factual or legal determination that is central to the court's reasoning or holding. Other jurisdictions have used Wikipedia in cases of first impression, though not in support of the court's reasoning or holding.[34] Such references to Wikipedia are not of concern because they are not dispositive to the court's central reasoning or holding.[35]

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31. *Id*. at 27 ("A collateral reference is a reference that appears in dicta, is used as a rhetorical flourish, or is cited to define a nonessential term.").

32. Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. Rev. 197, 221 (2000) ("Cases raising novel issues which no court in the jurisdiction (and perhaps the nation) has addressed, and which no statute or constitutional provision governs, present the clearest case for the importance of policy arguments. When statutes and case law fail to address a novel issue, common law courts can fashion a common law solution, creating law where none existed. In pure cases of first impression, courts are not constrained by precedent—they do not have to decide whether they can justify overruling, modifying, or extending an existing rule. Cases of first impression illustrate a gap in the legal landscape, which is much larger than a gap created by an ambiguous statute or general constitutional provision—a gap which the courts must fill."); *see also First Impression*, Legal Info. Inst., Cornell Univ. Law Sch., http://www.law.cornell.edu/wex/first_impression (last updated Aug. 19, 2010).

33. *See* Peoples, *supra* note 2, at 27; *see also* Baldanzi v. WFC Holdings Corp., No. 07 Civ. 9551, 2010 U.S. Dist. LEXIS 2525 (S.D.N.Y. Jan. 13, 2010) (showing the Baldanzi plaintiffs cited to Wikipedia for authority when claiming that their case should be dismissed for lack of subject matter jurisdiction because it involved less than 25,000 punitive class members, but not relying on the Wikipedia article in its final determination); Ret. Program for Emps. of Town of Fairfield v. NEPC, LLC, 642 F. Supp. 2d 92 (D. Conn. 2009) (referencing a Wikipedia article that provides readers with a contextual understanding of the Bernard Madoff ponzi scheme, but not relying on the Wikipedia article in its final determination); Alfa Corp. v. OAO Alfa Bank, 475 F. Supp. 2d 357 (S.D.N.Y. 2007) (defending the use of Wikipedia by an expert witness when he cited an article on "transliteration" in his report regarding the translation of the defendant's company name from Russian to English, but not relying on the Wikipedia article in its final determination); People v. Martinez, 905 N.Y.S.2d 847 (Crim. Ct. Bronx County 2010) (citing Wikipedia for background details that defined "sagging pants," but not relying on the Wikipedia article in its final determination).

34. *See* Conference Archives, Inc. v. Sound Images, Inc., No. 3:2006-76, 2010 U.S. Dist. LEXIS 46955 (W.D. Pa. Mar. 31, 2010) (citing Wikipedia for basic background information on the "look and feel" of a website, but not relying on the Wikipedia article in its final determination); EMI Ent. World, Inc., v. Priddis Music, Inc., 505 F. Supp. 2d 1217 (D. Utah 2007) (citing Wikipedia to define "karaoke" in a case determining whether defendants obtained the proper copyright agreements necessary to sell a karaoke product with synchronized lyrics and displays); State v. Ohio Dep't Nat. Res. (*ex rel.* Merrill), No. 2008-L-008, 2009 Ohio App. LEXIS 3653, at *75–76 (Ohio Ct. App. Lake County Aug. 21, 2009) (relying on Wikipedia to explain that "Wyoming" was not the state of Wyoming, but rather is an area located in Pennsylvania on Lake Erie, yet not using Wikipedia as central to the court's final holding).

35. *See* Peoples, *supra* note 2, at 27.

II. COLLATERAL REFERENCES

New York state courts and the Second Circuit have relied on information from Wikipedia solely for "collateral references," or minor points and background information that allows judicial opinions to be more comprehensive.[36] Typically, a collateral reference "is a reference that appears in dicta, is used as a rhetorical flourish, or is cited to define a nonessential term."[37] In *People v. Givenni*, the court did not use Wikipedia merely as a collateral reference; rather, the Wikipedia definitions and descriptions of helium were used as the primary basis for the court's central, factual finding that helium is a noxious gas and therefore prohibited for sale.[38]

In *People v. Martinez*, the New York Criminal Court of Bronx County cited to Wikipedia to establish the history of "sagging pants."[39] The defendant in the case had been charged with disorderly conduct because his pants were fitted below his buttocks, exposing his underwear and potentially his private parts.[40] Citing Wikipedia's article on "Sagging (fashion)" allowed the court to provide background on why sagging pants may have become a fashion statement.[41] The court noted that "sagging pants" were part of a trend that started in the U.S. prison system; inmates' uniforms were too big and would hang low because belts were prohibited from use due to safety concerns.[42] The summons was dismissed for facial insufficiency on a factual determination not based on the facts provided by Wikipedia. The court determined that the arresting officer did not properly allege that the defendant had violated the public order.[43] The use of Wikipedia was not central to the *Martinez* holding because it was not cited in the dismissal of the summons but rather was relied on only for providing the reader with context and "rhetorical flourish" regarding the history of sagging pants.[44] The court determined that the defendant did not disturb the public or violate public order by wearing his pants below his buttocks.[45] The court found that Martinez had not acted

36. *See supra* note 33. *But see* People v. Givenni, 898 N.Y.S.2d 829, 829 (Crim. Ct. N.Y. County 2010) (relying on citations to Wikipedia to define helium's characteristics for purposes of categorizing crimes within NYPL section 270.05 and ultimately denying the defendant's motion to dismiss the indictment for facial insufficiency).

37. Peoples, *supra* note 2, at 27.

38. *See Givenni*, 898 N.Y.S.2d at 829.

39. *See Martinez*, 905 N.Y.S.2d at 848 (citing *Sagging (fashion)*, Wikipedia, http://en.wikipedia.org/wiki/Sagging_%28fashion%29).

40. *Id.* at 847.

41. *See id.* at 848.

42. *See id.*

43. *See id.* at 849.

44. *See id.* at 848–49; *see also* Peoples, *supra* note 2, at 27 (stating that a "collateral reference is a reference that . . . is used as a rhetorical flourish" and that "[t]hese references added nothing to the substance of the opinion and were frequently popular culture or humor references").

45. *See id.* at 848–49 (finding the "[o]fficer's factual recitation [was] conclusory and [did] not allege any disturbance to the 'wonted calm of the whole community or of any sizeable segment thereof'" (citing People v. Chesnick, 302 N.Y. 58 (1950))).

with the "requisite intent to cause public inconvenience, annoyance or alarm, or recklessly create the risk thereof."[46] Thus, the history of sagging pants was inessential to the holding because it provided only the historical context of why he may have been wearing his pants in such a manner and did not address his intent (or lack thereof) to cause inconvenience, annoyance, or alarm.[47]

In *Givenni*, in contrast, the court relied on Wikipedia to establish key facts and the characteristics of helium, which directly led the court to classify helium as a noxious material under NYPL section 270.05. Therefore, in *Givenni*, the information the court cited from Wikipedia was central to the court's legal determination, rather than background information as in *Martinez*.[48]

Baldanzi v. WFC Holdings Corp. was a putative class action brought in the U.S. District Court for the Southern District of New York.[49] In their motions to dismiss the complaint for lack of subject matter jurisdiction and voluntary dismissal, the plaintiffs cited to Wikipedia to allege a failure to meet class certification requirements necessary for federal jurisdiction.[50] The plaintiffs' erroneous reliance on Wikipedia led them to believe that there must be fewer than 25,000 putative class members to determine the amount in controversy and that the amount in controversy must be at least $5 million to be heard in a federal court.[51] The court responded negatively to the plaintiffs' use of Wikipedia as a source for determining federal jurisdiction by noting,

> Wikipedia . . . touts its own unreliability, directing its users that, "[y]ou should not use Wikipedia by itself for primary research," and observing that the website's, "radical openness means that any given article may be, at any given moment, in a bad state: for example, it could be in the middle of a large edit or it could have been recently vandalized."[52]

The court denied the plaintiffs' motion to dismiss for lack of subject matter jurisdiction on other grounds; the motion did not meet the exception to the time-of-filing rule, which permits dismissal for lack of subject matter jurisdiction if the court determines with "legal certainty" that the plaintiff could not recover "a sufficient amount to satisfy the jurisdictional threshold"[53] and the court dismissed the

46. *See id.* at 849 (citing People v. Hill, 303 N.Y.S.2d 265 (N.Y. County Ct. 1969)).

47. *Id.* ("[P]eople can dress as they please, wear anything, long as they do not offend public order and decency." (citing People v. O'Gorman, 274 N.Y. 284, 287 (1937))).

48. *See* People v. Givenni, 898 N.Y.S.2d 829, 831–32 (Crim. Ct. N.Y. County 2010).

49. No. 07 Civ. 9551, 2010 U.S. Dist. LEXIS 2525, at *1 (S.D.N.Y. Jan. 13, 2010).

50. *Id.* at *9.

51. *See id.* (stating that Wikipedia "lead them to believe that there must be fewer than 25,000 putative class members" and citing "a statistical sampling of the market share of different co-op lenders in New York City" for the determination that their amount in controversy falls below the required $5 million).

52. *Id.* at *10 n.1 (citing *Wikipedia: Researching with Wikipedia*, Wikipedia, http://en.wikipedia.org/wiki/Wikipedia:Researching_with_Wikipedia).

53. *Id.* at *6–7 (the time-of-filing rule is a "well-settled rule that a federal court does not lose jurisdiction over a diversity action which was well-founded at the outset even though one of the parties may later change domicile or the amount recovered falls short of the statutory minimum" (citing Wolde-Meskel v.

complaint without prejudice.[54] Wikipedia's own disclaimer that it is unreliable and should not be used for primary research further indicates that it should not be used to support factual or legal determinations central to the court's reasoning.[55] The court's position on the plaintiffs' use of Wikipedia as inappropriate and unreliable suggests that reliance on Wikipedia by a court, particularly in a case of first impression, like *Givenni*, would be problematic and run counter to principles central to fair adjudication because the reasoning and analysis of the issues are not buttressed by stable sources.

In *Retirement Program for Employees of the Town of Fairfield v. NEPC*, a case that arose "out of investment losses in connection with Bernard Madoff's Ponzi scheme," the U.S. District Court of Connecticut addressed the issue of whether the plaintiffs' allegations against KPMG LLP were legally viable.[56] Defendant claimed KPMG was fraudulently joined in order to defeat diversity jurisdiction.[57] The court found KPMG was not fraudulently joined and thus it lacked jurisdiction over the matter and remanded the case to the Connecticut Superior Court.[58] When explaining the origins of the case, the court relied on Wikipedia for inessential information about

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Vocational Instructional Project Cmty. Servs., Inc., 166 F.3d 59, 62 (2d Cir. 1999))). The judge in *Baldanzi* denied the motion to dismiss because

> [a]n exception to the time of filing rule applies in instances in which the court determines, "to a legal certainty," that the plaintiff never could have recovered a sufficient amount to satisfy the jurisdictional threshold . . . . The legal certainty test is stringent: "[w]here the damages sought are uncertain, the doubt should be resolved in favor of plaintiff's pleadings, and [o]nly three situations clearly meet the legal-certainty standard for purposes of defeating the Court's subject matter jurisdiction: 1) when the terms of contract limit the plaintiff's possible recovery; 2) when a specific rule of substantive law or measure of damages limits the money recoverable by the plaintiff; and 3) when independent facts show that the amount of damages was claimed by the plaintiff merely to obtain federal court jurisdiction." None of these situations obtain here.

Id. at *8 (second and third alterations in original) (citations omitted).

54. *Id.* at *10–11.

> The Second Circuit has delineated the following factors as relevant "in determining whether a case should be dismissed with prejudice: [1] the plaintiff's diligence in bringing the motion; [2] any 'undue vexation' on plaintiff's part; [3] the extent to which the suit has progressed, including the defendant's efforts and expense in preparation for trial; [4] the duplicative expense of relitigation; and [5] the adequacy of plaintiff's explanation for the need to dismiss."

Id. (alterations in original) (quoting United States v. Cathcart, 291 Fed. App'x 360, 362 (2d Cir. 2008)) (internal quotation marks omitted).

55. *See Wikipedia: General Disclaimer*, WIKIPEDIA, http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer (last modified July 12, 2011, 5:20 PM) ("Wikipedia cannot guarantee the validity of the information found here.").

56. *See* 642 F. Supp. 2d 92, 93 (D. Conn. 2009).

57. *Id.* at 93.

58. *Id.* at 98.

the Madoff Ponzi scheme.[59] The court noted that those readers unfamiliar with the "infamous Madoff investment scandal" could consult Wikipedia for "background information."[60] However, the court also provided "a more traditional source" for information on Bernard Madoff's Ponzi scheme by providing a citation to a *New York Times* article that discussed Madoff's conviction and sentence.[61] Additionally, the court was careful to provide the date on which it accessed the Bernard Madoff Wiki page.[62] The reliance on Wikipedia for this collateral information was proper as it was not ultimately used for a factual determination central to the court's holding; in short, it did not affect the court's finding that KPMG was not fraudulently joined or its holding that the court consequently lacked jurisdiction over the case.

In contrast, the court in *Givenni* did not cite to Wikipedia to provide only general background on helium, but rather relied on Wikipedia as its main source of factual information to determine the central issue of the case: whether the characteristics of helium qualified it as a noxious gas. In addition, the court in *Givenni* did not include the dates when it accessed the Wikipedia or the New World Encyclopedia links. Providing access dates for citations to Wikipedia is necessary as it enables those reading the opinion to view the exact information the court used when drafting its opinion.[63]

The Southern District of New York in *Alfa Corp. v. OAO Alfa Bank* defended the use of Wikipedia in expert testimony for information essential to the legal analysis of the court.[64] The court denied the defendants' motion to exclude the plaintiff's two expert witnesses because it determined their opinions and expertise were sufficiently supported by experience and both adequately applied their opinions to the facts of the case.[65] The defendants challenged the experts' testimony, which relied partially on Wikipedia, claiming that Wikipedia is an "unreliable internet sourc[e]."[66] A linguist expert used, among other sources, a Wikipedia article titled *Transliteration of Russian into English*, in a report detailing the proper transliteration of the defendant's

59. *Id*. at 93 n.1 ("Readers unfamiliar with the infamous Madoff investment scandal can consult Wikipedia for more background information.").

60. *See id.* (referencing *Bernard Madoff*, Wikipedia, http://en.wikipedia.org/wiki/Bernard_Madoff (last visited July 10, 2009)).

61. *See id.* (referencing Diana B. Henriques, *Madoff Is Sentenced to 150 Years for Ponzi Scheme*, N.Y. Times, June 30, 2009, at A1).

62. *See id.* Citations to Wikipedia that provide the "date visited" information are helpful for subsequent readers because the information allows readers to view the Wikipedia page as it was on the date cited by searching through the "view history" page, which logs each edit to the article. *See* Peoples, *supra* note 2, at 39.

63. *See* People v. Givenni, 898 N.Y.S.2d 829 (Crim. Ct. N.Y. County 2010); *see also* Peoples, *supra* note 2, at 39 (explaining that due to Wikipedia's impermanent nature, "[a]ll future citations to Wikipedia in judicial opinions should include the date and time the Wikipedia entry was viewed").

64. *See* 475 F. Supp. 2d. 357, 361–62 (S.D.N.Y. 2007).

65. *See id.* at 361–63.

66. *Id.* at 361 (internal quotations omitted).

Russian name into English.[67] The court noted that "[c]ountless contemporary judicial opinions cite internet sources, and many specifically cite Wikipedia."[68] It continued, "[T]he frequent citation of Wikipedia at least suggests that many courts do not consider it to be *inherently* unreliable."[69] This conclusion that Wikipedia is not "inherently unreliable" because of the frequency of its use in opinions implies that Wikipedia *may* be utilized by courts if the information is accurate and no errors are detected or raised by the party in opposition of its use.[70] This use of Wikipedia highlights a concerning trend in which judges rely on Wikipedia (whether correctly or incorrectly) because previous courts have done so.[71]

This case is distinguishable from *Givenni* because, even though the *Alfa Corp.* court defended the use of Wikipedia in judicial opinions, it acknowledged Wikipedia's shortcomings and, most importantly, did not affirm the decision to admit the expert's testimony based on its confidence in the expert's use of Wikipedia.[72] The court reasoned that the expert relied more heavily on sources *other than* Wikipedia, and as the court did not question the reliability of those additional sources it admitted the expert's testimony.[73] This demonstrates that Wikipedia, though generally unsuitable, may be used as a secondary source when other, more reliable sources are used jointly with Wikipedia. However, the court in *Givenni* relied primarily on Wikipedia, noting two other sources—the New World Encyclopedia online, which is arguably equal to Wikipedia in unreliability, and the Lenntech website, which did not have expertise relevant to the issue in the case.[74]

The general trend in other jurisdictions confirms that collateral references to Wikipedia are acceptable, while cautioning that Wikipedia should not be used for determinations central to the analysis or holding. A search of the term "Wikipedia" in the "All States" database on Westlaw produced 157 results.[75] Generally these cases relied on Wikipedia only for collateral references, such as to define ancillary terms not directly relevant to the issue or dispositive of the holding. For example, in *O'Neill Camp, Inc. v. Stuart*, the Superior Court of Connecticut relied on Wikipedia to define the length and width of an American football field in order to compare it to

67. *Id.* at 363.

68. *Id.* at 361.

69. *Id.* at 362 (emphasis added).

70. *See id.*

71. *See* Peoples, *supra* note 2, at 3, 7.

72. *Alfa Corp.*, 475 F. Supp. 2d at 362–63.

73. *See id.* The expert relied "largely on his background and experience as 'an educated native speaker of Russian.'" He also cited to *The Transliteration of Modern Russian for English-Language Publications* by J. Thomas Shaw. He additionally consulted his colleague at the Yale Slavic Languages Department. *Id.*; *see also* Peoples, *supra* note 2, at 22.

74. *See* People v. Givenni, 898 N.Y.S.2d 829, 832–33 (Crim. Ct. N.Y. County 2010).

75. Westlaw, http://lawschool.westlaw.com/ (follow "Westlaw" hyperlink; then follow "Directory" hyperlink; then follow "Cases" hyperlink; then follow "All State Cases" hyperlink; then search "Wikipedia") (search results from Mar. 8, 2012).

the area of a cove in which the plaintiff and defendant both had interests.[76] The use of Wikipedia was not central to resolving the legal issue of whether the defendant had interfered with the plaintiff's prescriptive easement, the path by which he was granted access to the cove.[77] In *State v. Leckington,* the Supreme Court of Iowa had before it a case in which the defendant challenged a conviction that he had provided alcohol to a minor, neglected a minor, and committed child endangerment.[78] The court affirmed the conviction and held that there had been sufficient evidence to support finding neglect of a dependent and child endangerment. However, the court used Wikipedia to define "jungle juice," a term not essential to the court's factual or legal determination that the defendant's actions amounted to child neglect and endangerment.[79]

Several scholars and judges have contributed to the discussion on the appropriate use of Wikipedia in judicial opinions. Stephen Gillers, a professor at New York University Law School, supports the notion that Wikipedia may be used for inessential aspects of a determination. He states, "Wikipedia is best used for 'soft facts' that are not central to the reasoning of a decision."[80] Typically the use of Wikipedia for these "soft facts" offers no substantive value to conclusions of the court.[81] Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit also supports this view, stating, "It wouldn't be right to use [Wikipedia] in a critical issue. If the safety of a product is at issue, you wouldn't look it up in Wikipedia."[82]

Cass R. Sunstein also addressed problems concerning Wikipedia's lack of a sophisticated and demanding editing process, stating, "'I love Wikipedia, but I don't think it is yet time to cite it in judicial decisions . . . it doesn't have quality control . . . if judges use Wikipedia you might introduce opportunistic editing' to create articles that could influence the outcome of cases."[83] With the exception of *Givenni*, New

76. No. MMXCV074007804S, 2010 WL 1904931, at *9 (Conn. Super. Ct. Apr. 12, 2010) (citing *American Football*, Wikipedia, http://en.wikipedia.org/wiki/American_football) (describing the area of a football field as "360 feet in total length by 160 feet in total width").

77. *See id*. at *9–11.

78. 713 N.W. 2d 208 (Iowa 2006).

79. *Id*. at 211. The court relied on Wikipedia's definition of jungle juice: "[j]ungle juice is the name given to a mix of liquor that is usually served for the sole purpose of becoming intoxicated . . . . Often, it may include leftovers of many liquors along with a mixer (juice, cola, etc.) to make the clash of liquors easier to swallow . . . . Jungle juice made with Kool–Aid is called 'Hunch Punch.'" *Id.* at 211, n.1. The definition was provided for context to describe that the defendant had bought her son a half-gallon of vodka, after which her son and his friends "procured more vodka and alcohol so that they could make 'jungle juice.'" *Id.* at 211; *see also* Peoples, *supra* note 2, at 27.

80. Noam Cohen, *Courts Turn to Wikipedia, but Selectively*, N.Y. Times, Jan. 29, 2007, at C3, *available at* http://www.nytimes.com/2007/01/29/technology/29wikipedia.html?pagewanted=print.

81. *See* Peoples, *supra* note 2, at 27.

82. Cohen, *supra* note 80.

83. *Id*.

York state courts and the Second Circuit have followed this approach, citing Wikipedia only collaterally.[84]

III. CASES OF FIRST IMPRESSION

Cases of first impression in other jurisdictions have properly relied on Wikipedia, citing to it for information that is not essential to the legal reasoning or holding. A case of first impression exists

> [w]hen an issue is brought before a court which has not been addressed before . . . . It is the opinion or inference reached by a court, authority or person by applying the logic and reasoning on the circumstances prevailing in that case, when a similar precedence, decision, [or] ruling [does not] exis[t] to guide them.[85]

Citations to Wikipedia in cases of first impression are particularly problematic since, by definition, such opinions are the first to make a determination on a particular legal issue. Relying too heavily on Wikipedia, whether for facts or definitions, sacrifices reliability for convenience.[86] Cases of first impression that establish precedent and are based on unreliable sources such as Wikipedia may prove insidious to not only the case at bar but also subsequent cases considering the same or similar issues.[87]

The use of information from Wikipedia in cases of first impression is acceptable only if it is used collaterally.[88] *Conference Archives, Inc. v. Sound Images, Inc.*, a case of first impression, determined whether the "look and feel" of a website is protected by copyright or patent law.[89] In *Conference Archives, Inc.,* the U.S. District Court for the Western District of Pennsylvania determined whether summary motions, filed by both parties, were appropriate given the plaintiff's claims that defendants breached the parties' non-disclosure agreement and violated intellectual property protections.[90] The court relied on Wikipedia to provide general information on what is commonly understood by "look and feel" of a website.[91] This use of Wikipedia was not central to the court's ultimate decision to deny the plaintiff's motion for summary judgment because the Wikipedia definition did not determine whether the defendant had

84. *See supra* note 33; *see also* Peoples, *supra* note 2, at 27. *But see* People v. Givenni, 898 N.Y.S.2d 829 (Crim. Ct. N.Y. County 2010) (relying on citations to Wikipedia to define helium's characteristics and determining that helium is included under NYPL § 270.05 as a noxious gas, ultimately denying the defendant's motions to dismiss for facial insufficiency).

85. *First Impression Law & Legal Definition*, USLegal, http://definitions.uslegal.com/f/first-impression/ (last visited Feb. 18, 2012).

86. *See generally* Peoples, *supra* note 2, at 28–30.

87. *See* Jason C. Miller & Hannah B. Murray, *Wikipedia in Court: When and How Citing Wikipedia and Other Consensus Websites Is Appropriate*, 84 St. John's L. Rev. 633, 645–46 (2010); *cf.* Peoples, *supra* note 2, at 48 ("If Wikipedia becomes a legitimate source it could bring instability and uncertainty to the law.").

88. *See supra* note 32.

89. No. 3:2006-76, 2010 U.S. Dist. LEXIS 46955, at *1 (W.D. Pa. Mar. 31, 2010).

90. *See id.*

91. *Id.* at *58–59, n.52.

"infringed" on the plaintiff's website's "look and feel"; it merely defined the term.[92] The court found infringement based on expert testimony comparing the parties' websites and the admission by the defendant that she indeed did copy the "look and feel" of the plaintiff's website.[93] The court relied on a variety of other reliable academic sources, such as an article in *Santa Clara Computer & High Tech Law Journal* and an article by Kurt Saunders, a professor of business law at California State University, for descriptions of the phrase "look and feel."[94] Citations to Wikipedia in this context were acceptable because they were not the primary or sole source upon which the decision was made and were not cited as factual or legal determinations central to the court's ultimate holding.[95]

Similarly, in *State v. Ohio Department of Natural Resources (ex rel. Merrill)*, the Court of Appeals of Ohio in the Eleventh District in Lake County cited to Wikipedia for the purpose of demonstrating that the "Wyoming" referred to by the court was located in Wilkes-Barre, Pennsylvania rather than a reference to the state of Wyoming.[96] At issue was the appropriate boundary line of demarcation for the water's edge along the shores of Lake Erie.[97] The Wikipedia citation was not central to and had no bearing on the decision that the water's edge was the line of demarcation between the waters of Lake Erie and the lands privately held by the littoral owners.[98] Ultimately, the court vacated a portion of the trial court's decision regarding where the littoral owners' title rights ended in relation to the Lake Erie water's edge because those parties were not given "the opportunity to argue their positions for the trial court's consideration[,]" amounting to a violation of due process.[99] Wikipedia was used collaterally and provided no basis for the determination of the location of the line of demarcation. This is distinguishable from *Givenni* because the central legal determination in *Givenni* rested on what Wikipedia stated about helium, allowing the court to hold that helium is a noxious gas pursuant to NYPL section 270.05.

The court in *EMI Entertainment World, Inc. v. Priddis Music, Inc*, a case of first impression involving the copyright of musical compositions and associated lyrics for karaoke machines, cited Wikipedia to provide the origin of the word karaoke.[100] The issue was whether the defendants obtained proper copyright agreements in order to

92. *Id.* at *62.

93. *Id.* at *66.

94. *Id.* at *59–60.

95. *See* Peoples, *supra* note 2, at 29 ("A Wikipedia entry should not be relied upon as the only basis for the court's holding, reasoning, or logic.").

96. *See* No. 2008-L-008, 2009 Ohio App. LEXIS 3653, at *75–76 n.29 (Ohio Ct. App. Lake County Aug. 21, 2009).

97. *See id.* at *1–2.

98. Black's Law Dictionary 434 (3d pocket ed. 2006) (defining "littoral" as "of or relating to the coast or shore of an ocean, sea, or lake").

99. *Ex rel. Merrill*, No. 2008-L-008, 2009 Ohio App. LEXIS 3653, at *34–35.

100. *See* 505 F. Supp. 2d 1217, 1219 n.1 (D. Utah 2007) ("The term karaoke is Japanese (*kara*, empty + *oke(sutora)*, orchestra), suggesting that the music is provided by a virtual orchestra rather than a live

sell a karaoke product with synchronized lyrics and displays.[101] The citation to Wikipedia provided history to those unfamiliar with the art of karaoke.[102] Wikipedia was used as a secondary source and it was preceded by a Webster's dictionary definition of the word karaoke; and most importantly, it was not central to the reasoning or holding in the case.[103] Therefore, the citation to Wikipedia in *EMI* was appropriate because it was only used collaterally to provide background information not dispositive of the final determination and it was used in conjunction with other, more reliable sources. In contrast, *Givenni* cited to Wikipedia to determine that helium was encompassed in the section 270.05 definition of noxious material—a factor central to the court's holding in that case.

While Wikipedia undoubtedly is used in a significant number of cases, there are proper and improper circumstances in which courts may use it. First, dependence on Wikipedia to support a court's analysis is appropriate only for collateral references. The *Givenni* court failed to follow the trend in New York and Second Circuit case law of only referencing Wikipedia in dicta, for nonessential information or for rhetorical embellishment.[104] Furthermore, the *Givenni* court should have heeded the precedent in other jurisdictions that Wikipedia is appropriate only for citing background information providing the reader with a contextual understanding, when a more reliable or authoritative source does not exist, and when the reference does not go to a factual or legal determination central to the court's analysis of the issue, reasoning, or holding.

The *Givenni* court should have cited to established scientific resources, those more reliable than Wikipedia. New World Encyclopedia and Lenntech did not constitute valid scientific sources that would have justified Wikipedia's use as a secondary source. New World Encyclopedia online also lacked the requisite reliability of a source used centrally in a judicial opinion, in part because it failed to provide the credentials of the people editing the articles. The information provided by Lenntech also failed as a relevant or reliable source to describe helium as used in balloons because Lenntech's expertise was in helium's effects on water treatment, not the effects of helium on individuals inhaling it from balloons.

One commentator summarizes the harmful effects of Wikipedia: "citation of an inherently unstable source such as Wikipedia can undermine the foundation not only of the judicial opinion in which Wikipedia is cited, but of the future briefs and judicial opinions which in turn use that judicial opinion as authority."[105] If the use of Wikipedia by judges and courts is not carefully scrutinized, parties and counsel may

band." (citing Webster's New World College Dictionary 781 (4th ed. 1999); *Karaoke*, Wikipedia, http://en.wikipedia.org/wiki/Karaoke)).

101. *See id.* at 1219–20.

102. *See id.* at 1219.

103. *See id.*

104. *See* Peoples, *supra* note 2, at 27.

105. Cohen, *supra* note 80 (quoting Kenneth H. Ryesky, a tax lawyer who teaches at Queens College and Yeshiva University).

begin to strategically edit Wikipedia articles to their benefit when appearing before a judge who they know relies on Wikipedia.[106]

While Wikipedia proves to be a very tempting source to cite, judges must ensure that when relying on Wikipedia in their opinions, they do so for proper, nonessential information that does not support their analysis or conclusions of factual or legal issues or, alternatively, that the citation is bolstered by additional, more reliable sources. Courts should cite to Wikipedia only if the following elements are satisfied: (1) Wikipedia is used for background information, solely providing the reader a contextual understanding; (2) a more reliable or authoritative source does not exist; and (3) the citation to Wikipedia is not used for an essential factual definition or legal determination that is central to the court's analysis of the issue, reasoning, or holding.

106. *See id.* (summarizing Cass R. Sunstein's assertion that Wikipedia may be opportunistically edited by parties to influence the outcome of cases).