GENETICS

How a Legal Brawl Between Two Rich Guys Could Change How We Think About DNA

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It was the kind of lawsuit that would only happen in Florida.

Toronto businessman Harold Peerenboom and Marvel Entertainment chairman Isaac "Ike" Perlmutter were locked in an absurd suburban skirmish, bickering over who should run the tennis center at Sloan's Curve, the exclusive Palm Beach waterfront community where both men resided. Peerenboom wanted to open bidding for the position. Perlmutter was happy with the status quo, a woman named Karen Donnelly who had run the center for years.

Soon, the skirmish escalated to all-out war. Bankrolled by Perlmutter, Donnelly sued Peerenboom, claiming that he had slandered her at community board meetings. Meanwhile, Peerenboom began receiving volumes of hate mail, and his neighbors and business associates received letters accusing him murder and molesting children. Naturally, Peerenboom sued Perlmutter back.

And it didn't stop there. Next came the event that would elevate this reality-TV-ready drama to a case of national interest.

Peerenboom, seeking to pin Perlmutter as the mastermind behind the hate mail campaign, conspired with his attorney to covertly collect DNA from Perlmutter in order to compare it to

DNA extracted from saliva on the hate mail envelopes. So the two came up with an elaborate scheme: His attorney subpoenaed and deposed Perlmutter and his wife as part of a separate lawsuit; during the course of that litigation, Peerenboom's attorney attempted to gather Perlmutter and his wife's DNA from objects they had touched, including papers specially treated to collect genetic material. Eventually, they captured DNA from a water bottle the Perlmutters had used inside the courtroom.

One laboratory interpretation of the secretly collected DNA samples excluded the Perlmutters altogether. Another, which the Perlmutters alleged was false, found that Mrs. Perlmutter could not be excluded as a suspect. They handed the results of the test to the police, who had been trying to get to the bottom of the hate mail campaign.

In 2016, the Perlmutters countersued Peerenboom, his attorney, and the forensic lab for "conversion." Conversion is roughly the civil court equivalent of theft. The Perlmutters were alleging that Peerenboom and his attorney had effectively stolen their DNA.

Now, what began as a tete-a-tete about a community tennis center is now poised to potentially reshape how we think about who owns our DNA and the information it encodes.

"By collecting analyzing and testing genetic material to obtain the Perlmutter's confidential genetic information, conspirators exercise an act of dominion and authority that deprives the Perlmutters' of their right to ownership, possession, control, and privacy," the initial countersuit read.

The Golden State killer case, in which police tracked down a suspected serial killer using the DNA of one of his relatives on a genealogy website, makes the case appear all the more urgent.

Peerenboom promptly filed a motion to dismiss, in all likelihood fully expecting the motion to be granted. To argue that something has been stolen, you first have to make the case that you owned it in the first place. And in the past, courts have generally upheld that samples of your biological material are not something you can own.

In the 1980s, for example, a patient named John Moore who had been treated at UCLA Medical Center for hairy cell leukemia took his doctor and UCLA to court after the doctor developed a patented cell line from the T cells in his removed spleen that could help fight bacteria and perhaps even cancer. Moore argued that he was owed a share of the potential profits, since the line was derived from his cells. In the landmark 1990 decision, though, the California Supreme Court concluded that while Moore's doctor had been obligated to disclose how he was using Moore's cells, Moore also had no property rights over the cells.

The more famous example that may come to mind is the case of Henrietta Lacks, whose cells were collected from a cervical tumor in 1951 and went on to become one of the most important cell lines in medical research, even as she died in obscurity and her heirs struggled to make ends meet. But even after Rebecca Skloot's book, *The Immortal Life of Henrietta Lacks,* brought recognition to the case, her family only gained some control over how the cell lines are used, not financial remuneration.

“For the past now almost 30 years, that’s been the party line, that individual people don’t have any sort of ongoing property interests in their cells or their tissue once that leaves their body,” Jessica Roberts, the director of the University of Houston Health Law and Policy Institute, told Gizmodo.

Peerenboom v. Perlmutter, now in its fifth year of litigation in the 15th Judicial Circuit Court of Florida, may upend all that.

Instead of throwing the counterclaim out, in January 2017, Judge Meenu Sasser agreed to let the claim continue.

“The Perlmutters plainly retain intangible rights to their genetic information,” she wrote, adding, “At the very least, one possesses important privacy interests in such information.”

Even if the Perlmutters don’t eventually prevail, the case is significant, said Roberts.

“It goes against almost 30 years of what we thought we knew about people’s interest in their genetic data,” she said.

Peerenboom v. Perlmutter diverges from past cases involving ownership of biological samples in a few key ways.

In the U.S., “conversion” refers to “the exercise of wrongful dominion or control over property to the detriment of the rights of the actual owner.” After Peerenboom and his attorney collected the Perlmutters’ DNA, they sent the samples to a forensic lab for genetic testing.

In Florida, explained the Perlmutters’ attorney, Roy Black, “it’s not so much taking DNA that’s a crime as the testing of it. In Florida it’s clearly against the law to test someone’s DNA without permission.”

Florida is one of only a handful of states that criminalizes testing someone’s DNA without permission. This case, said Black, will determine whether it’s also something for which you can sue for damages in civil court.

“It’s a very new issue, and the courts and lawmakers will have to make a decision about it,” Black said. “It really is a very *1984* issue, because so much can be determined about people from their DNA. The law has to catch up with the privacy concerns here.”

(Gizmodo reached out to the attorney for Peerenboom, Michael Bowen, but he did not respond to a request for comment.)

But unlike in past cases, said Jennifer Wagner, a lawyer and the associate director of Bioethics Research at Geisinger, the Perlmutters didn’t argue that it was their DNA itself that was stolen, but the genetic information inside of it. That distinction may have been enough to let the court disregard past cases.

And, said Roberts, they didn't argue that their financial interests were compromised when that data was stolen, but that their privacy was.

"Law professors and bioethicists tend to divide up property and privacy and say privacy is this thing that has to do with dignity and our ability to control information, and property has to do with know commercialization and ownership," Roberts said.

Roberts thinks that this argument is a good thing—that an ownership argument when it comes to biospecimens can help strengthen people's privacy rights to them.

Not everyone agrees.

"A lot of people say that by recognizing a property right in our genetics, we're on the slippery slope of commodifying human beings," Roberts said, "and that your genetic data is too precious to be property."

Even if the Perlmutters' case prevails, it would only have legal precedence in Florida. But, said Roberts, the Moore case was a California lawsuit that wound up becoming the law of the land.

If the case prevails, it could force consumer genetic testing companies like 23andMe and AncestryDNA to be clearer about how they are using customer data. Already, a sense of ownership over DNA data has fueled a new crop of companies that seek to reward people financially for sharing their genetic information.

"This opens the door for people to claim some sort of ownership over their data," she said.

John Conley, a University of North Carolina law professor who studies the control of genomic information, said the case could also potentially expand fourth amendment search and seizure rights to include DNA, and make it harder for medical researchers to use DNA samples.

Still, he said, he's skeptical that this one case, which involves rather absurd circumstances, could truly create a shift.

"This case is interesting," he said, "But it's not going to change the legal landscape all by itself."

Peerenboom v. Perlmutter, though, may only be the first of many lawsuits making a similar argument. Another dispute underway in Alaska, *Cole v. Gene by Gene*, similarly makes the case for ownership as a way of protecting genetic privacy.

"It's too early to know what will happen, and I don't want to overstate what this means," said Roberts. "But there is an openness to hear these cases that we haven't seen in the past."

In the meantime, Peerenboom and Perlmutter show no signs of standing down. Five years in, and both parties are still at it, filing motions and objections and endlessly amending complaints. As it stands now, the case is stuck in purgatory, as is the future of who truly owns a person's DNA.