Editors Only.

The Newsletter for Editorial Achievement • Vol. 14, No. 10 • October 1996

Privacy Law 101: A Primer for Editors

What constitutes "invasion of privacy?"

By Lawrence Savell

Beyond libel claims, probably the most common asserted basis for lawsuits editors, writers, and publishers face is invasion of privacy. Once again, familiarity with the major types of privacy invasion can help editors in advance of publication identify and work to minimize potential risks.

Categories of Privacy Invasion

There are four traditional and major categories of invasion of privacy: (1) appropriation of name

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or likeness; (2) public disclosure of private or embarrassing facts; (3) "false light"; and (4) intrusion. Not all states recognize all of these variants; different states may define them in various ways. Editors of publications that are distributed nationally or at least across state lines may find themselves subject to the laws of many jurisdictions.

Appropriation

Appropriation of name or likeness is the only traditional form of invasion of privacy recognized in New York (although there have been several efforts in recent years to expand such scope). As embodied in New York Civil Rights Law sections 50-51, a plaintiff must prove: (1) use of the plaintiff's name, portrait, or picture; (2) for advertising or trade purposes; and (3) without prior written consent.

As noted generally above, the laws of different states vary on these elements. For example, written consent is not required in all jurisdictions.

Generally speaking, only living individuals can bring such a claim. Thus, in a recent Wisconsin federal case, a court ruled that murderer Jeffrey Dahmer's father, who dedicated his book to the families of his son's victims, did not invade the families' privacy under Wisconsin law, since that state's law applies only to living and named

individuals.

There are some exceptions to appropriation laws, whereby conduct that would ordinarily constitute a violation is nevertheless permitted. Perhaps the most common of these is the "newsworthy exception," which exempts articles concerning — or photographs illustrating — newsworthy events or matters of public interest. A recent example of this was a New York state case, *Merriwether v. Shorr*, involving an article and photographs appearing in *Popular Photography* magazine. The author/photographer included pictures she had taken while working as a chauffeur, including a shot of a lesbian couple heading to their commitment ceremony. Although they had declined to consent to the picture's publication, the court ruled in favor of the publisher. The court noted that a publisher's unauthorized use of a person's likeness is permitted in connection with the dissemination of information of public interest, if the use of the likeness bears a reasonable relationship to the information. It pointed out that the fact that — as here — there may also be dissemination of personal information which the owner of the likeness would prefer not to disseminate is not a ground for relief under the Civil Rights Law. The court concluded that the increasing ability of the gay community to participate in ceremonies once reserved to the heterosexual population was a reflection of the progress of society and was thus newsworthy. The Merriwether case illustrates that courts may go far to uphold the right of publishers to illustrate articles on newsworthy subjects with pictures of real people, so long as the pictures bear a reasonable relationship to the subject being covered.

As will be noted later, the laws of other jurisdictions may provide broader rights to plaintiffs, such that, for example, the disclosure of such private (albeit accurate) facts may be a ground for a claim elsewhere. Plaintiffs in states that have narrow privacy protections often try to compensate by attempting to invoke other theories for recovery, such as the infliction of emotional distress claim additionally (and unsuccessfully) raised in Merriwether; others attempt to argue that the photograph is defamatory, claiming that the use of their picture in connection with an article on a negative subject (such as drug use or crime) created the allegedly libelous implication that the plaintiff was a bad person or had done such bad things. The lesson for editors is to make sure that the illustrations you use are reasonably related to the stories you tell, and do not have the possibility to create an inaccurate and potentially damaging implication. Further insulation can come from obtaining a broad written consent from the subject of any pictures used.

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Another common exception to appropriation liability is the "media advertising" or "incidental advertising" exception. Under this exception, you may be able to use a photograph you ran in a news article in a later advertisement for your magazine as a sample of the work you publish. Note that this exception is sometimes limited to cases of "news disseminators," although that term may be broadly construed; courts have ruled it includes magazines. The classic case applying this exception involved a suit by Joe Namath against *Sports Illustrated*, where the court ruled in favor of the magazine, which used a photograph of him which had originally appeared as part of an article, in later advertisements for the magazine. The recent case of *Howard Stern v. Delphi Internet Services Corp.* extended such protection to operators of online services.

Public Disclosure of Private Facts

A second category of invasion of privacy recognized in some states is *public disclosure of private or embarrassing facts.* In general, this provides that:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that:

(1) Would be highly offensive to a reasonable person,

and

(2) Is not of legitimate concern to the public.

Note that, unlike in the case of libel, truth is not a defense to a "public disclosure" claim.

As many recent cases have illustrated, "public disclosure" cases often turn on the issue of what constitutes legitimate public concern. In a recent Georgia case, the court ruled that a woman who shot and killed an intruder in her bedroom could not recover damages from a newspaper for invasion of privacy, since she became an object of legitimate public interest when she committed a homicide, however justified; thus, the newspaper had the right to accurately report the facts regarding the incident, including her name.

False Light

A third category of invasion of privacy recognized in some states is "false light." In general, this provides that:

One who falsely gives publicity to a matter concerning another that places the other in a false light is subject to liability to the other for invasion of his or her privacy, if:

(1) The false light in which the other was placed would be highly offensive to a reasonable person, and

(2) The person giving publicity had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Note that the second requirement echoes the "actual malice" element seen in many libel cases. Indeed, "false light" often overlaps with the negative depiction seen in defamation cases. As a result, when the law allows, many plaintiffs assert both "false light" and libel claims in a single case.

Intrusion

The final category of invasion of privacy recognized in some states is "intrusion," which relates more to aggressive newsgathering than reporting. In general, this provides that:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his or her private affairs or concerns, is subject to liability to the other for invasion of his or her privacy, if the intrusion would be highly offensive to a reasonable person.

Intrusion claims commonly involve situations of surreptitious surveillance, trespassing, or access to information or premises through false pretenses. In a closely-followed case decided earlier this year and currently on appeal to the Third Circuit, the U.S. District Court for the Eastern District of Pennsylvania enjoined two broadcast journalists preparing a story on the high salaries paid to a company's executives from engaging in conduct allegedly invading the privacy of two company employees and their children.

The Court found that the plaintiffs presented sufficient evidence to support a reasonable likelihood of success on their claim for invasion of privacy based upon intrusion upon seclusion under Florida and Pennsylvania law.

The Court concluded that a reasonable jury could find that the journalists "intentionally intruded, in a manner that would be highly offensive to a reasonable person, upon the solitude and seclusion of the Wolfsons by engaging in a course of conduct apparently designed to hound, harass, intimidate and frighten them." It stated that although journalists had the right to photograph the family from a highway outside their house, the evidence indicated that intrusion went beyond taking pictures from public locations, characterizing it as the "complete and blatant disregard of the Wolfsons' 'right to be let alone' to enjoy the tranquility and solitude of their home." Several media groups have joined in an amicus brief urging reversal, arguing that the reporters' conduct was not actionable because there was no physical intrusion into a private place.

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Editors Only is published monthly by Editors Only Publications, 275 Batterson Drive, New Britain, CT 06053. ISSN: 0735-8490. Subscriptions are $89 in the U.S., $95 in Canada and Mexico and $105 elsewhere. Printed in U.S.A.

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