LETTERS

'Right to Privacy'

To the Editor:

As one who has studied and written on New York's right of privacy (see Savell, "Right of Privacy — Appropriation of a Person's Name, Portrait, or Picture for Advertising or Trade Purposes Without Prior Written Consent: History and Scope in New York," 48 *Albany Law Review* 1-47 (1983)), I wish to correct some inaccuracies in Leonard Marks' otherwise excellent April 12 article, "Granting Publicity Rights to Heirs Protects Performers' Privacy Rights."

First, contrary to Mr. Marks' assertion (and that of the Court of Appeals in the 1902 *Roberson* case), Warren and Brandeis titled their seminal article (which was actually published in 1890) and the right it advanced "The Right *To* Privacy," although in succeeding years the "right *of* privacy" became the common expression of the concept used by courts, legislatures and commentators.

Second, nowhere in the record or opinions in *Roberson* is there any support for Mr. Marks' statement that, among the plaintiff's other injuries, "Abigail complained that she became . . . sore, lame, [and] disabled" — although the equally legendary Mrs. Palsgraf may have expressed such complaints.

Finally, the statement that "[w]ithin a year of the *Roberson* decision, New York adopted the Civil Rights Law providing for a misdemeanor (Sec. 51)" is technically inaccurate. While today the statutory protection is found in the Civil Rights Law and in those cited sections, such protection was initially enacted as 1903 N.Y. Laws Chapter 132, with Sec. 1 containing the language of current Sec. 50 and Sec. 2 containing only the first sentence of current Sec. 51. The actual Civil Rights Law was not enacted until 1909 N.Y. Laws Chapter 14. Moreover, while Mr. Marks is correct in stating that "[t]he legislature was quick to respond," it was apparently not responding to the *Roberson* decision per se but to the resulting great public sympathy for the plaintiff which led to a storm of professional and popular disapproval reflected, among other ways, in a flurry of articles in lay periodicals and law journals criticizing the Court of Appeals' decision. Indeed, as reported in an unusual *Columbia Law Review* article by Court of Appeals Judge Denis O'Brien, who had joined in and was then defending the *Roberson* majority opinion, a prior bill aimed at "prohibiting the use of pictures and photographs without the consent of the person represented" had been viewed as "the most unpopular bill that had made its appearance in the legislature for many years," resulting in its and its authors' defeat.

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