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Advertising and the Right of Privacy

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COMMENTS

ADVERTISING AND THE RIGHT OF PRIVACY

The right of privacy is a relatively recent development of American jurisprudence. Until 1904, it had not been recognized in any American court. Prior to and since that time much has been written urging recognition of the right. The right of privacy is now recognized in nearly all states.[1] This comment will examine how this doctrine has been applied in cases involving the use of one's name or photograph in an advertisement without his consent.

I.

INTRODUCTORY REMARKS ON THE RIGHT OF PRIVACY

No discussion involving the right of privacy is complete without noting the source which gave rise to the acceptance of privacy as an independent, legal right. A law review article by Samuel D. Warren and Louis D. Brandeis[2] which demonstrated the need for such a right and strongly advocated the recognition of it has been credited with providing the impetus. The authors based the necessity for the protection of one's privacy on the unscrupulous practices of the press at that time. They stated:

> Of the desirability—indeed of the necessity—of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. . . . To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual. . . .[3]

Prior to the article, any invasion of what is now known as the right of privacy had to be redressed by resort to other forms of action. Accordingly, an action of defamation was often used, but in order to recover, no matter how widely circulated or unsuited to publicity, the matter published

1. See Peay v. Curtis Publishing Co., 78 F. Supp. 305 (D.D.C. 1948); Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E.2d 742 (1952); Pallas v. Crowley, Milner & Co., 322 Mich. 411, 33 N.W.2d 911 (1948); see also Annot. 14 A.L.R.2d 750 (1950).

2. Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

3. *Id.* at 196.

must have had a direct tendency to lower others' estimation of the plaintiff.[4] In other cases the courts granted relief on a theory of an invasion of a property right, or of a breach of an implied contract. At common law one had a property right in his ideas, artistic works, or musical compositions. He could prevent any attempt to publish them, but once he consented to any publication, he lost his property interest. In *Prince Albert v. Strange*,[5] an English court held that etchings made by the plaintiff and Queen Victoria for their personal benefit could not be published or described by the defendant without infringing the artist's property rights in the paintings. And in *Pollard v. Photographic Co.*,[6] where the plaintiff had her picture taken by the defendant, and it was subsequently used by him in a window display, the court found a breach of an implied promise in the defendant's agreement to photograph the plaintiff. However, these remedial devices were wholly inadequate to prevent injury to one's personal feelings, and implicit in all these cases is the recognition of a more general right of the individual to be let alone.

It is not easy to ascertain from the cases what essential elements constitute a violation of the right to privacy since the courts have been principally concerned with whether the right exists at all.[7] Privacy was described by Cooley as the right "to be let alone."[8] Most authorities refer to it in this manner while others have termed it the right to freedom from unlawful interference with seclusion,[9] or the right to be free from "exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibility."[10] As is the case with general definitions, these offer little help in determining when an individual's right to privacy has been invaded. However, for our purposes it appears that any use of one's name or photograph in an advertisement without his consent would constitute a violation of the right of privacy.[11] In *Eick v. Perk Dog Food Co.*,[12] the Illinois Supreme Court spoke of the commercial use of one's name or photograph as being within the narrowest definition of the right of privacy.[13]

4. *Id.* at 197.

5. 1 Mac. & G. 25, 41 Eng. Rep. 1171 (Ch. D. 1849); see also Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911), where it was held that one has an exclusive property right to his picture.

6. 40 Ch. D. 345 (1888).

7. The *Restatement of Torts* treats the right of privacy in one section where it is simply stated: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." RESTATEMENT, TORTS § 867 (1939).

8. COOLEY, TORTS 192 (Student's ed. 1907).

9. Gregory v. Bryan-Hunt Co., 295 Ky. 345, 348, 174 S.W.2d 510, 512 (1943).

10. Continental Optical Co. v. Reed, 119 Ind. App. 643, 648, 86 N.E.2d 306, 308-09 (1949).

11. See Annot., 138 A.L.R. 22, 72 (1942).

12. 347 Ill. App. 293, 106 N.E.2d 742 (1952).

13. *Id.* at 745.

II.

THE GENERAL RULE WITH RESPECT TO ADVERTISING

As noted above, the general rule is that the unauthorized use of one's photograph in an advertisement would be a clear violation of the right of privacy.[14] An examination of the cases dealing with such situations does not reveal the reasons for the rule. Rather, it seems that once a court has reasoned that a right of privacy should be recognized, it necessarily follows that a violation would occur where one's photograph or name is used in an advertisement without his consent.

Such a conclusion is justified by a comparison of the interests involved: an important right of the individual competes for protection with the business interest of another in increasing his own profits. In this conflict the right of the individual to his privacy clearly emerges as the superior right. Although it is important to have laws to promote the economic interests of the community, the law has always been more concerned with securing to the individual the right to live in a society free from efforts by others to interfere with his rights for their own benefit and to his detriment.

The general rule was not accepted without difficulty. A leading American case concerning the legal recognition of the right of privacy arose in the advertising field.[15] The plaintiff's picture was used without her consent in an advertisement for defendant's product. It appeared that this was the ideal case to establish the right of privacy urged by Warren and Brandeis twelve years earlier, but the New York Court of Appeals denied recovery for the plaintiff on the ground that she had no right of privacy to be infringed.[16] The opinion was quickly overruled by a statute[17] which made it unlawful to use the name or picture of a living person for trade or advertising purposes without his consent.

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14. See Annot., 138 A.L.R. 22, 72 (1942).

15. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). The question had been considered previously in Corliss v. E. W. Walker Co., 57 Fed. 434 (C.C.D. Mass. 1893) and Atkinson v. Doherty, 121 Mich. 372, 80 N.W. 285 (1899), where the right was not recognized.

16. It should be noted that the court was principally concerned with the recognition of the right of privacy and the consequences therefor. The basis for the denial of the right was the lack of precedent, coupled with the fear that a contrary holding would open the door to a vast amount of litigation, bordering upon the absurd.

17. A person, firm or corporation that uses for advertising purposes, or for purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor, of his or her parent or guardian, is guilty of a misdemeanor. N.Y. CIV. RIGHTS LAW § 50.

Any person whose name is used . . . for advertising purposes or for the purposes of trade . . . may maintain an equitable action . . . to prevent and restrain the use thereof . . . and may also sue and recover damages. . . . But nothing contained in this act shall . . . prevent any person . . . practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless . . . written notice objecting thereto has been given by the person portrayed. . . . N.Y. CIV. RIGHTS LAW § 51.

The matter was soon discussed in another case involving advertising. In *Pavesich v. New England Life Ins. Co.*,[18] the plaintiff's picture appeared without his consent in an advertisement which attributed him with owning an insurance policy of the defendant. The Georgia Supreme Court rejected the reasoning of the New York Court of Appeals and held that a right of privacy existed,[19] and that the use of plaintiff's picture was a violation of the right.[20]

Another instance which appears to be a clear case of invasion of privacy is the use of one's photograph as an example or model of another's product. In *Olan Mills, Inc. v. Dodd*,[21] the plaintiff had her picture taken for her own private use by the defendant, a professional photographer. The defendant, without plaintiff's consent, subsequently had the picture reproduced on post cards and posters[22] which were used to advertise the quality of defendant's photographic work. The pictures did not identify the plaintiff by name. The court affirmed unequivocally the jury verdict for the plaintiff that there had been an invasion of her right of privacy.[23]

It should be noted that in the *Olan Mills'* case, in the absence of the existence of a right of privacy, there may have been a legal remedy available to the plaintiff under the theory of a breach of an implied promise by the photographer not to commercialize her picture.[24]

An equally clear violation of the right of privacy would be an advertiser attributing a statement about his product to someone who had not in fact made the statement, or had not given his consent to use the statement in an advertisement.[25] An analogous situation is presented by *Birmingham Broadcasting Co. v. Bell*.[26] The defendant solicited radio stations to carry its series of football games by stating that plaintiff would announce the games. Plaintiff had not so consented, and the Alabama Supreme

18. 122 Ga. 190, 50 S.E. 68 (1905).

19. The Georgia Supreme Court stated:

> The right of privacy has its foundation in the instinct of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private, and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law. *Id.* at 69-70.

20. It is interesting to note that although the article by Warren and Brandeis based the need for the recognition of a right of privacy principally on the unscrupulous practices of the press at that time, the right of privacy was first recognized in an advertising context.

21. 235 Ark. 488, 353 S.W.2d 22 (1962).

22. One hundred fifty thousand post cards containing the plaintiff's picture were mailed in Arkansas and surrounding states. Enlargements of the picture were carried by door-to-door salesmen who were soliciting orders.

23. In § 51 of the N.Y. *Civ. Rights Law* it is specifically provided that a professional photographer may display in his studio pictures taken by him as an example of the quality of his work.

24. See note 5 *supra*.

25. Foster-Milbourn Co. v. Chinn, 134 Ky. 424, 120 S.W. 364 (1909).

26. 259 Ala. 656, 68 So. 2d 314 (1953).

Court declared that in such a case an invasion of privacy would occur but for the fact that a right of privacy was not recognized in the state at that time.

Generally, then, when one's name or photograph appears in an advertisement without consent, the former's right to privacy is violated.[27]

III.

QUALIFICATIONS

A. *Freedom of the Press*

One generally understood limitation on the right to privacy is that it must not abridge the right of freedom of the press. Once a person engages in activity about which the public has the right to be informed, he cannot complain of an abridgement of his privacy if this activity is held up for public observance.[28] Indeed, it was the right of freedom of the press which delayed recognition of the right of privacy. In *Corliss v. E. W. Walker Co.*,[29] a suit was brought by a widow and children to enjoin the unconsented-to publication of decedent's biography. The district court of Massachusetts maintained that under our laws one can speak and publish what he desires, provided it is not obscene or defamatory; whether or not the subject of the publication is private or public in character is inconsequential.

A problem arises when a valid news article is included in an advertisement. Does a violation of the right of privacy occur? Certainly the constitutional guarantee of freedom of the press should not be abridged. But it would appear that the reasons for protecting the freedom of the press are in no way advanced by allowing a valid news article to be displayed in an advertisement. After the public's right to a free press is safeguarded, the individual's right of privacy should intervene to avoid unfair commercial exploitation of his personality.

The courts generally agree to protect the individual's privacy where the advertisement does not involve the circulation of the news article. For example, the use in an advertisement of plaintiff's picture taken while in the Army, which appeared in a newspaper article describing the work of servicemen overseas, was held to be an invasion of his right to privacy.[30] And in *Flores v. Mosler Safe Co.*,[31] the defendant, in order to advertise the necessity for office safes, reprinted in its entirety a news article of a fire which mentioned the plaintiff's name several times. The court found that plaintiff's right of privacy had been infringed.

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27. See note 11 *supra.*

28. ". . . A right of privacy where recognized, does not include protection from publication of matter of legitimate public or general interest. . . ." Elmhurst v. Shoreham Hotel, 58 F. Supp. 484, 485 (D.D.C. 1945).

29. 57 Fed. 434, 435 (C.C.D. Mass. 1893).

30. Continental Optical Co. v. Reed, 119 Ind. App. 643, 86 N.E.2d 306 (1949).

31. 7 N.Y.2d 276, 164 N.E.2d 853, 196 N.Y.S.2d 975 (1959).

If, however, the news article is used to advertise the publication in which it appeared, no violation occurs. Shirley Booth, the movie actress, was photographed for an article which was published in *Holiday* magazine. The lead portion of this article was reproduced in an advertisement for *Holiday* as an example of its contents. Miss Booth sued for an invasion of privacy on the ground that the reproduction of the article in the advertisement was unauthorized. She did not contest the newsworthiness of the original article. A New York court held that *Holiday* had the right to reproduce the article and denied recovery.[32]

One basis for distinguishing between the advertisement of a product and advertisement of news media is that circulation must be maintained and increased for an effective free press. However, whether a subject of legitimate news interest is used to attract customers to purchase an office safe or to purchase a magazine should not matter. In each case the purpose of the advertiser is to increase profits, and this purpose should be the controlling reason for granting relief to the party whose picture, name, or statement is used without authorization.

B. *Public Personalities*

Another qualification of the right to recover for invasion of privacy occurs in situations in which consent is implied. This is frequently the case where pictures of a public figure are used to advertise his public activities. A movie actor cannot complain if his picture or name appears in an advertisement for a movie in which he is featured.[33] The actor's consent to the advertisement may be easily implied from his consent to have the movie shown to the public. Similarly it would not seem objectionable to use the name or photograph of a lecturer to advertise that he was to make a public appearance if he consented to appear in the first place. But some courts have not chosen to draw the line at this point.

In *O'Brien v. Pabst Sales Co.*,[34] a much publicized college football player had posed for pictures to be used by his school's publicity department. One such picture was used by defendant on a calendar which set forth the complete football schedule of all major college and professional teams—and advertised Pabst Blue Ribbon Beer. The court denied plaintiff's claim of an invasion of privacy on the ground that he had implicitly consented to the picture appearing on the calendar.

It is hard to understand how the plaintiff could have consented to appear in the beer advertisement by posing for publicity pictures for his college. It would seem that the implied consent should extend only to publicity for the school itself. An argument favoring use of the picture because the calendar listed the football schedule of the school is not convincing since there were many schedules on the calendar, and the resultant

32. Booth v. Curtis Publishing Co., 15 App. Div. 2d 343, 223 N.Y.S.2d 737 (1962).
33. See Sinclair v. Postal Tel. & Cable Co., 72 N.Y.S.2d 841 (Sup. Ct. 1935).
34. 124 F.2d 167 (5th Cir. 1941).

publicity to the school was at best negligible. Publishing the schedules was strictly for the benefit of the defendant, and he should not have had the right to exploit the plaintiff's personality without compensation.

Pallas v. Crowley-Milner & Co.[35] in which a showgirl's picture was taken to be used as publicity for activities connected with her employment relates an even more extreme violation. The picture was procured from the photographer by the defendant and used in an advertisement of the defendant's cosmetic products. In the subsequent suit, the court held that it is essential to establish a serious and unreasonable interference[36] with one's right to privacy, and whether a claimed interference is in fact serious and unreasonable depends on whether plaintiff had in any degree abandoned her strictly private character.[37] There does not seem to be any connection between plaintiff's consent to the use of publicity pictures and the relinquishment of her right of privacy as to the use of her picture in an advertisement.

The somewhat inadequate results of the *O'Brien* and the *Pallas* cases can be partially explained on the approach taken by the courts when public figures are involved. In the *O'Brien* case the court, although excluding the plaintiff's right to recover on a theory of a right to privacy, indicated that plaintiff could recover if he showed that the use of his picture on the calendar implied his use of the defendant's product,[38] and in the *Pallas* case, the court was concerned with the mere use of the plaintiff's picture without a purported endorsement of the product by the plaintiff.[39] If a public personage is involved, the advertisement must be shown to portray the individual as recommending or endorsing the use of the product before an invasion of privacy is found. This view is without merit. The fact that the person appears in the advertisement should be sufficient to give him a cause of action. Whether or not a party is attesting to the use of the product should not be important. His personality is being used to attract people to the advertisement, and the mere use of the name or photograph is sufficient to accomplish the advertiser's objective.

A public figure does not entirely relinquish his right to privacy. Courts have frequently affirmed the rule that a public figure only surrenders a portion of his right to privacy, and generally his personality cannot be

35. 334 Mich. 282, 54 N.W.2d 595 (1952).

36. This requirement is also adopted by the *Restatement*. See RESTATEMENT, TORTS § 867 (1939).

37. Pallas v. Crowley, Milner & Co., 334 Mich. 282, 285, 54 N.W.2d 595, 597 (1952).

38. O'Brien v. Pabst Sales Co., 124 F.2d 167, 169 (5th Cir. 1941).

39. See Pallas v. Crowley, Milner & Co., 322 Mich. 411, 417, 33 N.W.2d 911, 914 (1948) (a prior disposition of the case mentioned in note 35 *supra*), which remands the case to the lower courts for certain findings of fact. The court said, "Whether plaintiff has been damaged by the publication of her photograph, or whether it carries an inference that she uses, or approves of the use of, these brands of cosmetics, are questions which cannot be decided on the hearing and determination of a motion to dismiss." The reason for determining the existence of the inference appears to be that the plaintiff would have a cause of action for misrepresentation if approval were present.

exploited for commercial purposes without his consent.[40] However, some courts apparently do not consider the use of one's name or photograph in an advertisement commercial exploitation, unless it also carries an implication that the identified party is endorsing the use of the advertiser's products.

C. *Collateral and Incidental Use*

A third qualification to the right of privacy is that imposed by the courts in the interpretation of the New York statute prohibiting use of one's name or picture for trade or advertising purposes without consent.[41] In order to recover under the statute it is necessary for the plaintiff to prove that his name or picture was used in more than an incidental way. A distinction is made between a *collateral* and an *incidental* use, granting relief in the former instance and denying it in the latter.[42] In *Moglen v. Varsity Pajamas, Inc.,* the plaintiff's name appeared in a sports article about a tennis match which plaintiff had lost. The defendant manufactured a fabric on which was reproduced a portion of the article, and the codefendant used the fabric in making underwear and pajamas. Recovery was denied on the ground that the statute requires some meaningful or purposeful use of the name. The court stated that the inclusion of this news article was incidental to the design of the fabric; even more casual and incidental than the use of the article was the appearance of plaintiff's name.[43]

This distinction between a collateral and incidental use is analogous to the requirement exemplified in the *Pallas* case of a serious and unreasonable interference with one's right to privacy.[44]

The distinction between collateral and incidental use is also applied to preserve the use of valid news material in some forms of advertising. The *Flores* and *Booth* cases demonstrate this distinction. In the *Booth* case, the court said that promotion of the news medium was only incidental advertising and not actionable;[45] and in *Flores,* the fact that the defendant chose to reprint the entire original news coverage of the fire for the sole purpose of soliciting purchasers for his products resulted in a collateral and actionable use of the news article.[46] The latter case apparently would consider as controlling the fact that the news article itself was the essence of the advertisement.

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40. Birmingham Broadcasting Co. v. Bell, 259 Ala. 656, 68 So. 2d 314, 319 (1953); see also Booth v. Curtis Publishing Co., 15 App. Div. 2d 343, 223 N.Y.S.2d 737, 745 (1962).

41. See N.Y. CIV. RIGHTS LAW § 51 (see text at note 15 *supra*).

42. Shubert v. Columbia Pictures Corp., 189 Misc. 734, 72 N.Y.S.2d 851 (Sup. Ct. 1947); Moglen v. Varsity Pajamas, Inc., 13 App. Div. 2d 114, 213 N.Y.S.2d 999 (1961).

43. Moglen v. Varsity Pajamas, Inc., 13 App. Div. 2d 114, 213 N.Y.S.2d 999, 1002 (1961).

44. Pallas v. Crowley-Milner, 334 Mich. 282, 54 N.W.2d 595 (1952).

45. Booth v. Curtis Publishing Co., 15 App. Div. 2d 343, 223 N.Y.S.2d 737 (1962).

46. Flores v. Mosler Safe Co., 7 N.Y.2d 276, 164 N.E.2d 853, 196 N.Y.S.2d 975 (1959).

IV.

ADVERTISING A VALID NEWS ARTICLE

An interesting problem arises in those cases dealing with the use of one's name or photograph in connection with a newsworthy subject for the purpose of attracting customers to purchase a book or periodical. In *Oma v. Hillman Periodicals, Inc.*,[47] the plaintiff's picture appeared on the back cover of a magazine which contained an article concerning the abolition of boxing. Plaintiff was a professional boxer, but the article was not about him nor did it mention his name. It was held that this was not commercial exploitation, because plaintiff was a member of a class which was in the public eye.

The initial problem in such cases appears to be whether the use of the picture in such a manner constitutes advertising. The dissent in the *Oma* case argued that whenever a picture is used solely to attract readers there is commercial exploitation.[48] The problem is analogous to that which arises in advertising a news magazine. The picture is certainly being used to promote the sale of the magazine, but it is also being used to call attention to a subject of legitimate news value. The courts undoubtedly consider the promotion of the press a more valuable goal than the preservation of the right to be free from commercial exploitation, and sacrifice the latter in favor of the former.[49]

V.

CONCLUSION

The courts are generally in accord in finding an invasion of the right of privacy in situations involving the unauthorized use of one's name or photograph in an advertisement. Because a substantial interference with the right of privacy may be necessary in order to be actionable,[50] there can be mitigating circumstances which will result in an implied waiver of the right to privacy. But it is submitted that whenever one's name or photograph appears in an advertisement which does not primarily concern the person involved, and which has the obvious purpose of producing a profit for the advertiser an invasion of privacy will occur.

What is ultimately being suggested in order to grant relief in these cases is not necessarily a finding of an interference with the right of

47. 281 App. Div. 240, 118 N.Y.S.2d 720 (1953).

48. 118 N.Y.S.2d 720, 726 (1953).

49. This situation brings to mind the common use of photographs of famous actors and actresses in picture frames in order to attract buyers for the frames. Although there may be no objection by most of those involved because of the desirable publicity feature, should it be said that they would have no right to prevent or recover for such exploitation? Under the dissenting opinion of the *Oma* case it appears that they would have a right of recovery.

50. See note 34 *supra*.