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TORTS-RIGHT OF PRIVACY-INVASION OF PRIVACY THROUGH FICTIONAL WORKS

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TORTS—RIGHT OF PRIVACY—INVASION OF PRIVACY THROUGH FICTIONAL WORKS—The New York Civil Rights Law prohibits the use of a person's name, portrait, or picture without his consent in writing, for advertising or trade purposes, under penalty of civil and criminal liability.[1] Plaintiff, senior civil affairs officer of the American Military Government in the town of Licata, Sicily, during its occupation by Allied Armies of World War II, brought suit under the statute against the author of the book "A Bell for Adano," and others,[2] alleging that he occupied the position of the book's and play's principal character, "Major Victor Jappolo" in the fictitiously named town of Adano; and that the book and play exploited his acts, personality, and life without his consent. Neither plaintiff's name nor picture was used in the fictitious productions. *Held*, with one justice dissenting, action dismissed. *Toscani v. Hersey*, 271 App. Div. 445, 65 N.Y.S. (2d) 814 (1946).

Although the right of privacy has not been universally recognized, it has during a half century's growth come to be an accepted branch of the law in many jurisdictions.[3] The greatest number of cases have involved the appropriation by one for his own profit of another's interest of personality as exemplified in his name or likeness.[4] Not infrequently the exploitation of the personality interest has been, as alleged in the principal case, through the fictional media of

[1] N.Y. Laws (1903) c. 132, §§ 1, 2, as amended in 1911 and 1921, 8 N.Y. Consol. Laws (McKinney 1916) §§ 50, 51.

[2] N.Y. TIMES, March 14, 1946, p. 27:4 reported that in this action the plaintiff had joined as defendants the book's author, John Hersey, and publisher, Alfred A. Knopf Co., the Playwrights Producing Company, producers of the play, and Twentieth Century Film Corporation, producers of the film.

[3] A landmark in this development is Warren and Brandeis, "The Right To Privacy," 4 HARV. L. REV. 193 (1890).

For the present status of the law, see Nizer, "The Right of Privacy, A Half-Century's Developments," 39 MICH. L. REV. 526 (1941).

[4] PROSSER, LAW OF TORTS, § 107 at p. 1056 (1941); Green, "The Right of Privacy," 27 ILL. L. REV. 237 (1932).

novels, stories, and moving pictures. Subject to the limitations hereinafter discussed, where the right of privacy is recognized, it is actionable to appropriate intentionally in a work of fiction another's name,[5] picture,[6] or life incidents wherein he is named.[7] Since fictional works are usually intended for commercial circulation, the use of one's name or likeness in this form generally satisfies from the moment of its publication the requirement that the appropriation be for purposes of trade or advertising.[8] The general privilege given matters of public interest, usually associated with newspaper accounts[9] and news-reel films,[10] has as yet not been invoked to protect the publisher of a totally fictitious production.[11] But despite the natural capacity of fiction as a vehicle for invasion of privacy, the courts have considerably contracted the area of liability by strict rules of limitation. There can be no invasion of another's right of privacy without an intent to capitalize his identity; a mere similarity of names between the fictional character and the plaintiff is not sufficient to make the publication actionable.[12] There must be a substantial parallel between the real and the fictional

[5] In Kreiger v. Popular Publications, Inc., 167 Misc. 5, 3 N.Y.S. (2d) 480 (1938), defendant publisher was held to have violated plaintiff's civil rights under the New York statute, by using the name of the plaintiff, a prominent prize fighter, over one hundred times as a "character of prominence" in a short story, "Deuces for the Duke."

[6] In Semler v. Ultem Publications, Inc., 170 Misc. 551, 9 N.Y.S. (2d) 319 (1938), plaintiff, a professional model, recovered damages from defendant magazine publisher for the unauthorized publication of a photograph of the plaintiff, dressed in a negligee, in a magazine called "Silk Stocking Stories."

[7] Plaintiff was an ex-prostitute who had been tried and acquitted of murder. She later married and was living among friends who did not know of her past. Defendant produced and distributed a motion picture entitled "The Red Kimono," based upon the plaintiff's life history, in which the plaintiff's maiden name was used. Held, that defendant had invaded plaintiff's constitutional right to pursue and obtain happiness. Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931).

In Binns v. Vitagraph Co. of America, 147 App. Div. 783, 132 N.Y.S. 237 (1911), affd., 210 N.Y. 51, 103 N.E. 1108 (1913), L.R.A. 1915C 839, the court held that a film re-enactment of the first rescue at sea resulting from a radio SOS call violated the right of privacy of the wireless operator. The plaintiff's picture and name were used in the moving picture and his part was played by a professional actor.

[8] 8 N.Y. Consol. Laws (McKinney, 1916) §§ 50, 51; Semler v. Ultem Publications, Inc., 170 Misc. 551, 9 N.Y.S. (2d) 319 (1938); Kreiger v. Popular Publications, Inc., 167 Misc. 5, 3 N.Y.S. (2d) 480 (1938).

[9] Sarat Lahiri v. Daily Mirror, Inc., 162 Misc. 776, 295 N.Y.S. 382 (1937) (picture of a magician used with an article on the Hindu Rope Trick).

[10] Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y.S. 752 (1919), where defendant's news reel portrayed plaintiff, woman attorney, in her investigation and solution of a murder mystery; Blumenthal v. Picture Classics, Inc. 235 App. Div. 570, 257 N.Y.S. 800 (1932), where in a factual movie short of New York City plaintiff peddlar was photographed in a close up while selling bread and rolls on a street corner.

[11] The privilege was asserted by defendant and denied by the court in Binns v. Vitagraph Co., of America, supra, note 7.

[12] Nebb v. Bell Syndicate, Inc., (D.C.N.Y. 1941) 41 F. Supp. 929, where the court dismissed the suit of one Rudy Nebb of Georgia, who alleged that his name had been used as the principal character of the comic strip "The Nebbs," in violation of the New York Civil Rights Law. The defendant had never heard of plaintiff before his action was brought.

persons, although the plaintiff's name be used [13] or incidents unmistakenly taken from his life be depicted.[14] An attempt has been made to place stage and assumed names outside the protection afforded the right of privacy.[15] The right is further limited by the rule of *de minimis non curat lex*: for incidental use of a name or picture in a novel [16] or movie,[17] where the impression upon the public is trifling, recovery has been denied. The principal case marks a further qualification upon the right of privacy by a jurisdiction which has consistently construed its privacy statute strictly.[18] In effect, the decision suggests that it is unlawful to exploit another's personality by a pictorial description, but not by a word description; [19] that the right of privacy may be invaded freely and without liability by an exploiter who need only be careful to omit publication of the picture or name of his subject. It will be interesting to see whether this doctrine will be accepted by courts which have not confined the right of privacy in a straight-jacket of statutory construction, but have worked it into the fabric of their common law.[20]

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[13] In Swacker v. Wright, 154 Misc. 822, 277 N.Y.S. 296 (1935), although the name of the plaintiff, an attorney, was given a minor character who was secretary to the district attorney in a novel, the court found no parallel between the real and fictional "Frank Swacker."

[14] In Levey v. Warner Bros. Pictures, Inc., (D.C. N.Y. 1944) 57 F. Supp. 40, plaintiff, former wife of George M. Cohan, brought action under the New York Civil Rights Law against the producer of a fictional biographic movie of the life of Cohan called "Yankee Doodle Dandy," in which Mrs. Cohan was portrayed and incidents which occurred during the marriage of plaintiff and Cohan were depicted. The court held that the motion picture did not "sufficiently portray" the plaintiff to sustain her suit.

[15] Davis v. R.K.O. Radio Pictures, Inc., (D.C. N.Y. 1936) 16 F. Supp. 195. But see Gardella v. Log Cabin Products Co., Inc., (C.C.A. 2d, 1937) 89 F. (2d) 891, where the fictitious name, "Aunt Jemima," of pancake flour fame, was held to come within the protection afforded by the New York Civil Rights Law, although the suit was dismissed on other grounds.

[16] Damron v. Doubleday, Doran & Co., 133 Misc. 302, 231 N.Y.S. 444 (1928), affd. without opinion, 226 App. Div. 796, 234 N.Y.S. 773 (1929).

[17] Merle v. Sociological Research Film Corp., 166 App. Div. 376, 152 N.Y.S. 829 (1915).

[18] Undoubtedly the penal features of the statute, although rarely invoked, have contributed to the statute's strict construction by the New York courts. See, for example, Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y.S. 752 (1919), cited at note 10, supra.

[19] The court distinguished Binns v. Vitagraph Co. of America, 147 App. Div. 783, 132 N.Y.S. 237 (1911), affd., 210 N.Y. 51, 103 N.E. 1108 (1913), L.R.A. 1915C (note 7, supra) on the ground that "in the present case, no living person was named and no picture or other similar likeness of anybody was used." Principal case at 815. The dissenting judge argued that a "picture," under the statute, was not limited to a photograph but included any representation of the person. This view is the general rule in the field of defamation, where the plaintiff may recover by proof that the defamatory matter referred to him, though he is not named or pictured. Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd., (Ct. App. 1934) 50 T.L.R. 581; Colvard v. Black, 110 Ga. 642, 36 S.E. 80 (1900).

[20] For example, Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905), 69 L.R.A. 101 (1906); Foster-Milburn v. Chinn, 134 Ky. 424, 120 S.W. 364 (1909), 34 L.R.A. (n.s.) 1137 (1911).