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TORTS-STATUTORY RIGHT OF PRIVACY

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TORTS—STATUTORY RIGHT OF PRIVACY—Defendants used the name and portrayed the career of one Jack Donahue in a motion picture and exhibited this film in Utah. Plaintiffs, Donahue's heirs, brought suit under a Utah statute which creates a remedial action for the use of the "name, portrait, or picture" of a person, living or dead, "for advertising purposes or purposes of trade" without the written consent of that person or his heirs.[1] There was no use of Donahue's name, portrait or picture for the purpose of advertising the film. The film "biography" was in part without factual basis. The defendants contended that the late Donahue was a public figure, having attained wide popularity as an entertainer during his lifetime, and that the Utah statute was

[1] Utah Code Ann. (1943) §103-4-9. Sec. 103-4-8 makes such action a misdemeanor.

not intended to protect public figures from the use of their names and careers in films such as this. The federal district court entered a summary judgment dismissing the complaint, but the court of appeals, in a close decision,[2] reversed and remanded the cause, *holding*: Donahue's status as a public figure does not make it permissible, under the Utah statute, for the defendants to present a *fictional* treatment of his career "for purposes of trade." *Donahue v. Warner Bros. Pictures, Inc.*, (10th Cir. 1952) 194 F. (2d) 6.

Conceived in response to the need, in an era of increasing publicity, to protect individuals from the exploitation of their names and likenesses,[3] the common law right of privacy has as its aim a proper balance between two competing interests: the individual's interest in the enjoyment of privacy and society's interest in the free flow of information through the channels of communication.[4] This right of privacy has not been generally accepted by the courts,[5] at least as a distinct legal right,[6] and, as in most newly-developing fields of law, the posture of case-law in those jurisdictions which have recognized the right of privacy indicates that some confusion still attends its definition and delimitation.[7] Thus, although there is general recognition that a public figure, i. e., one whose acts or accomplishments bring him within the orbit of popular interest, has less claim to privacy than the ordinary citizen,[8] the decisions vary as to the extent his right is diminished.[9] In the few states affording statutory

[2] The court was divided 3/2 with Phillips, C. J. and Pickett, J., concurring in a vigorous dissenting opinion.

[3] See the pioneer article in this field, Warren and Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193 at 195 (1890).

[4] Id. at 214.

[5] Judicial reluctance to grant relief for what is essentially an invasion of the right of privacy has not been as great where the right could be subsumed under an older, and presumably more respectable, legal category such as a property right: Prince Albert v. Strange, 1 Mac. and G. 25, 41 Eng. Rep. 1171, 2 DeG. and Sm. 652, 64 Eng. Rep. 293 (1849); Edison v. Edison Polyform & Mfg. Co., 73 N.J. Eq. 136, 67 A. 392 (1907); Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911); but see Atkinson v. John E. Doherty & Co., 121 Mich. 372, 80 N.W. 285 (1899). Or an implied contract: Pollard v. Photographic Co., 40 Ch. Div. 345 (1888); Moore v. Rugg, 44 Minn. 28, 46 N.W. 141 (1890).

[6] For the present state of authority, see annotations in 138 A.L.R. 22 (1942); 168 A.L.R. 446 (1947); 14 A.L.R. (2d) 750 (1950).

[7] For a thorough discussion of the development of the right of privacy and the problems involved, see Nizer, "The Right of Privacy: A Half Century's Developments," 39 MICH. L. REV. 526 (1941).

[8] Some decisions deal with the question in terms of a "waiver" of this right by the public figure, as in Corliss v. E. W. Walker, (C.C. 1894) 64 F. 280, and Cohen v. Marx, 94 Cal. App. (2d) 704, 211 P. (2d) 320 (1949). Such an approach does not seem fruitful, however, for it becomes a mere fiction in situations where the facts completely negate consent. Metter v. Los Angeles Examiner, 35 Cal. App. (2d) 304, 95 P. (2d) 491 (1939); Sidis v. F-R Publishing Corp., (2d Cir. 1940) 113 F. (2d) 806, cert. den. 311 U. S. 711, 61 S.Ct. 393 (1940).

[9] Compare Pavesich v. New England Mut. Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905), and Kerby v. Hal Roach Studios, 53 Cal. App. (2d) 207, 127 P. (2d) 577 (1942) with O'Brien v. Pabst Sales Co., (5th Cir. 1941) 124 F. (2d) 167, cert. den. 315 U.S. 823, 62 S.Ct. 917 (1942).

protection to the right of privacy, the statutes have not clarified the status of the public figure, for no distinction is made between the public figure and the ordinary citizen.[10] The New York courts, in applying a statute similar in wording and purpose to the Utah statute,[11] have held that the statute does protect the public figure against the unauthorized use of his name or likeness in advertising or selling a product,[12] but does not prohibit use in connection with the publication of news,[13] or of material of informational value to the general public.[14] In determining what matters are permissible because of their informational value, the New York course of decision has indeed been erratic. At times, the courts have resorted to a distinction between a factual treatment of events involving the public figure, which is permissible, and a fictional treatment, which is not,[15] but this distinction has not been the real fulcrum of decision in this area, for it is often ignored, and seldom rigidly applied.[16] Behind, and at the source of, the confusion in the New York cases seems to be a shifting judicial attitude as to the scope of the statute. In what seem to be the better reasoned cases, the courts have proceeded beyond the finding that the defendant-publisher had a commercial motivation to a consideration of the material itself, demonstrating considerable reluctance to apply the statute so long as some informational value could be found;[17] in other cases, the courts tend to ignore the possible value of the publication itself and probe the motivations of the publisher in an effort to determine whether the publication is "for purposes of trade,"

[10] N.Y. Civil Rights Law (McKinney, 1948), §§50, 51; 2 Va. Code (1950) §8-650 (limited to residents of the state); Utah Code Ann. (1943) §§103-4-8, 103-4-9. It may be noted that some states specifically deal with the problem of adjusting the individual interest in privacy and the public interest in "news" in the special case of a female victim of rape or similar assault. See, for example, Wis. Stat. (1949) §348.412.

[11] New York seems to be the only state with a substantial judicial gloss upon its statute, and consequently, this note will emphasize the course of decision in New York, as did the court in the Donahue case.

[12] Eliot v. Jones, 66 Misc. 95, 120 N.Y.S. 989 (1910); Loftus v. Greenwich Lithographing Co., 192 App. Div. 251, 182 N.Y.S. 428 (1920); Lane v. F. W. Woolworth Co., 171 Misc. 66, 11 N.Y.S. (2d) 199 (1939).

[13] Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y.S. 752 (1919); Sweenek v. Pathe News, (D.C. N.Y. 1936) 16 F. Supp. 746; Middleton v. News Syndicate Co., 162 Misc. 516, 295 N.Y.S. 120 (1937).

[14] People on Complaint of Stern v. Robert R. McBride & Co., 159 Misc. 5, 288 N.Y.S. 501 (1936); Sidis v. F-R Publishing Co., supra note 8.

[15] Lahiri v. Daily Mirror, 162 Misc. 776, 295 N.Y.S. 382 (1937); Krieger v. Popular Publications, 167 Misc. 5, 3 N.Y.S. (2d) 480 (1938).

[16] Compare Humiston v. Universal Film Mfg. Co., supra note 13, with Blumenthal v. Picture Classics, 235 App. Div. 570, 257 N.Y.S. 800 (1932), affd. without opinion 261 N.Y. 504, 185 N.E. 713 (1933), and Ruth v. Educational Films, 194 App. Div. 893, 184 N.Y.S. 948 (1920), with Jack Redmond v. Columbia Pictures Corp., 253 App. Div. 708, 1 N.Y.S. (2d) 643 (1937), affd. 277 N.Y. 707, 14 N.E. (2d) 636 (1938).

[17] Colyer v. Richard K. Fox Pub. Co., 162 App. Div. 297, 146 N.Y.S. 999 (1914); Lahiri v. Daily Mirror, supra note 15. And see especially, for contrast with the Donahue case, Koussevitzky v. Allen, Towne and Heath, 188 Misc. 479, 68 N.Y.S. (2d) 779 (1947), where a biography containing some departures from fact was held not to be "fiction" and permissible under the statute.

and thus, ipso facto, prohibited.[18] The majority opinion in the principal case seems to illustrate the defects in this latter approach. The defendant's motives in making the film afford no index to its possible informational value, which would seem to be the real question at issue. Nor can the value of the film be properly assessed by a mechanical application of the factual-fictional distinction, as the New York experience with this distinction well proves.[19] Indeed, the court's use of this distinction, as the dissent in the principal case pointed out,[20] makes it questionable whether historical novels or most historical films may be distributed in Utah without liability under the statute, and demonstrates a marked lack of regard for the freedom of speech and press guaranteed by the United States Constitution.[21] It is doubtful that this decision will survive with unimpaired vigor.

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[18] Binns v. Vitagraph Co. of America, 210 N.Y. 51, 103 N.E. 1108 (1913); Krieger v. Popular Publications, 167 Misc. 5, 3 N.Y.S. (2d) 480 (1938).

[19] See cases cited in note 16 supra.

[20] Principal case at 19-22.

[21] That the motion picture enjoys these guarantees has recently been definitely established. Burstyn v. Wilson, 343 U.S. 495, 72 S.Ct. 777 (1952); Gelling v. Texas, 343 U.S. 960, 72 S.Ct. 1002 (1952).