

## **A Historical Retrospective on New York's Right of Privacy Law: 115 Years of New York Court of Appeals Jurisprudence**

By Edward H. Rosenthal and Barry Werbin



**Edward H. Rosenthal**



**Barry Werbin**

If there be ... no law now to cover the savage and horrible practices, practices incompatible with the claims of the community in which they are allowed to be committed with impunity to be called a civilized community, then the decent people will say that it is high time that there were such a law.<sup>1</sup>

Thus opined the *New York Times* on August 23, 1902, commenting on the “savage and horrible practice”—then permitted by the New York Court of Appeals—of allowing Franklin Mills Company to get away with photographing and distributing lithographic prints of little Abigail Roberson as part of an ad campaign for Franklin Mills Flour, which described her as the “Flour of the Family.”<sup>2</sup> Abigail’s mother was quite upset and sued on behalf of her minor daughter for damages and injunctive relief.

Characterizing the claim as of a type that had never crossed the desk of the Court but akin to seeking redress for violation of some privacy right without any libel element, the Court of Appeals concluded, in a close 4-3 decision, that New York’s common law did not recognize any such cause of action, despite allegations that the daughter had been “greatly humiliated by the scoffs and jeers of persons who have recognized her face and picture on this advertisement and her good name has

been attacked, causing her great distress and suffering both in body and mind; that she was made sick and suffered a severe nervous shock, was confined to her bed and compelled to employ a physician....”<sup>3</sup>



The *New York Times* editorial did not ring hollow and, faced with an outcry, the New York State legislature took prompt action by enacting a statute in 1903 that became the Civil Rights Law, codifying a right of privacy in two short sections.<sup>4</sup> Succinct and limited in scope, § 50 of the Law, a criminal provision that has gone unchanged since 1903, provides:

A person, firm or corporation that uses for advertising purposes, or for the 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.

Section 51, which was amended and expanded after 1903, provides a private right of action to “[a]ny person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without ... written consent.”<sup>5</sup> Remedies are provided for damages and injunctive relief (as they were in 1903). Exemplary damages may be sought only if a violation is willful and would otherwise be unlawful under § 50.<sup>6</sup>

The right in question, often called a “Right of Publicity,” is generally recognized as one form of protection for the right of privacy—the right to be left alone—described in a 1890 law review article by Samuel Warren and future Supreme Court Justice Louis Brandeis.<sup>7</sup> The article and its progeny identified four types of privacy protections, including the right to be free of intrusion into one’s private life, free from the public revelation of embarrassing private facts, protection from false light depictions, and protection from the misappropriation of a person’s name or likeness for commercial purposes. It is this fourth prong that is at the heart of the issue under discussion. The New York Court of Appeals has repeatedly stressed

that, in New York, the sole remedy for a breach of privacy lies in the statute.<sup>8</sup> In other words, there is no protection in New York for the other types of privacy rights, such as publication of embarrassing private facts or false light portrayals that are protected in many other jurisdictions.

New York's statute does not grant any post-mortem enforcement rights, although use of a person's identifiable persona attributes for commercial purposes even after death may constitute trademark infringement in appropriate cases. Over the decades, important First Amendment principles and restrictions have been read into the statute and applied by New York state and federal courts to news reporting, matters of public interest, art, music, film, theatre, parody, media, and evolving technology and online usages.

As will be shown in the case summaries below, the New York Court of Appeals has recognized statutory protection for commercial misappropriation of living person's names and likenesses for more than 100 years. Yet it took 50 years for the first instance of the "right of publicity" nomenclature to be applied to the right of privacy under the Civil Rights Law, and it came with a 1953 Second Circuit decision involving chewing gum and baseball cards.<sup>9</sup> The plaintiff made gum and contracted with a ballplayer for the exclusive use of his photo in connection with its sales of the gum. Topps Chewing Gum (Topps) induced the ballplayer to permit it to also use his photo, despite the exclusivity held by the plaintiff. Topps argued that the signed agreement was a mere release of liability because the ballplayer had no property interest in his photo outside of his statutory right of privacy, "i. e., a personal and non-assignable right not to have his feelings hurt by such a publication."<sup>10</sup> The Court refused to so limit the statute, noting that "in addition to and independent of that [statutory] right of privacy . . . a man has a right in the publicity value of his photograph, i. e., the right to grant the exclusive privilege of publishing his picture . . . . Whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth."

The Court observed:

This right might be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an

exclusive grant which barred any other advertiser from using their pictures.

We think the New York decisions recognize such a right.<sup>11</sup>

Having lasted largely unchanged for over a century and despite yielding a robust body of decisional precedent, a push for a major overhaul by myriad interest groups in the 21st century was probably inevitable. In 2017, the State legislature attempted in a rush to push through a bill (Assembly Bill A08155) that would have radically rewritten and substantially expanded the statute to create a dedicated right of publicity. Among its key provisions were the addition of a 40-year post mortem enforcement right, enhanced protection for a person's characteristics (including identifiable mannerisms and gestures), conditional protection against digital replicas ("a computer-generated or electronic reproduction of a living or deceased individual's likeness or voice that realistically depicts the likeness or voice of the individual"), and standing to sue by anyone whose "identity" was used in New York regardless of actual domicile.

After voluminous and sometimes heated submissions by numerous stakeholders, the 2017 bill died. However, in 2018, a revised version of the bill was introduced in both the Assembly and Senate with little or no actual legislative debate (Assembly Bill 8155-B, Senate Bill 5857-B). These bills also would have re-crafted the established statutory privacy right into a freely transferable property right. They also died, but the momentum increased to get something on the books, and 2019 will likely see another attempt at passage of some form of legislation.

While a detailed review of these bills is beyond the scope of this article, the authors want to leave the reader to ponder whether such a radical overhaul of New York's statute is necessary, or whether our courts have done an adequate job in protecting the personal privacy and attendant publicity rights that are covered by the statute. In this article, we are limiting ourselves to the cases decided by our highest court—the Court of Appeals—over the past 110 years. There are, of course, many significant cases decided by lower courts in New York State as well as by the federal courts in our jurisdiction.

For ease of presentation, we have divided the cases into several broad categories, while recognizing that many would fall into more than one group. We also do not intend to be comprehensive, and many of these cases could, in and of themselves, be the subject of lengthy articles. Finally, we take no position in this article, but hope that the following retrospective will both inform and, at times, entertain and perhaps shed some light on the question of whether a major revision of the New York statute is needed.

## Which Uses Fall Within Statutory Coverage?

While the “name, portrait, picture or voice” statutory formulation would seem to be fairly straightforward, the Court of Appeals has wrestled with questions as to whether a particular use falls within the language of § 51 (as have courts in other jurisdictions).

In *Cohen v. Herbal Concepts, Inc.*,<sup>12</sup> mother and daughter plaintiffs claimed that a photograph taken of them from behind and used in an advertisement for a cellulite elimination product infringed their right of publicity. The defendants argued that the identity of the plaintiffs could not be determined from the photos, but the Court of Appeals upheld the plaintiffs’ claim, holding that it was a question of fact as to whether the individuals were recognizable. It noted, among other things, that there were certain other identifying characteristics in the photographs and that the husband/father submitted an affidavit stating that he recognized the plaintiffs. The case demonstrates that the “name, portrait or picture” formulation under the statute will not be limited to clearly recognizable faces. Moreover, as protection for one’s own right to be left alone and free from commercial exploitation, simply recognizing yourself or a loved one may be sufficient to state a claim.

In two recent cases decided on the same day this year, the Court of Appeals upheld the dismissal of claims relating to the uses of avatars in the video game “Grand Theft Auto V.” In *Lohan v. Take-Two Interactive Software, Inc.*,<sup>13</sup> actress Lindsay Lohan claimed that an avatar of a blond woman, in one case wearing a denim skirt and large sunglasses and in another wearing a red bikini while displaying a peace sign, evoked her “images, portrait and persona.” The Court of Appeals ruled that while an avatar could constitute a “portrait” within the meaning of § 51, the images in question were not recognizable as Lohan, instead being “indistinct, satirical representations of the style, look and persona of a modern, beach-going young woman.” The Court did not reach the question of whether the use of an avatar in a video game constituted a use in advertising or trade under the meaning of the statute. In *Gravano v. Take-Two Interactive Software, Inc.*,<sup>14</sup> the Court of Appeals reached the same conclusion in a case brought by Karen Gravano, the daughter of alleged mobster Sammy “The Bull” Gravano, who alleged that an avatar in the same video game used her picture or portrait.

In *Allen v. Gordon*,<sup>15</sup> the Court of Appeals affirmed the lower court dismissal of a claim brought by a psychiatrist named Dr. Eugene Allen that the character “Dr. Allen” in the book *I’m Dancing as Fast as I Can*, which was about the defendant’s experiences with drugs, infringed his right of publicity. The Court noted that there was no physical description of Allen in the book, that his office location was different, and that the plaintiff had never treated the defendant author.

## Is the Use “Reasonably Related” to a First Amendment Protected Use?

Many of the leading cases before the New York Court of Appeals have involved uses of names or photographs of persons in traditionally protected media, such as newspapers and magazines, but where the plaintiff has claimed that he or she had nothing to do with the specific content of the news story or article. In *Arrington v. New York Times Co.*,<sup>16</sup> plaintiff Clarence W. Arrington objected to the use of his photograph in the *New York Times* magazine section illustrating an article entitled “The Black Middle Class: Making It.” Arrington contended that he had not given permission to use his image, and that the article in question expressed ideas and views with which he did not agree. The Court of Appeals affirmed the dismissal of his claims against the *New York Times*, holding that a picture illustrating an article on a matter of public interest is entitled to the protections for free speech and free press under both the federal and New York state constitutions, unless “it has no real relationship to the article, or unless the article is an advertisement in disguise.”<sup>17</sup>

Significantly, the Court did not dismiss the claims against the photographer who took the photo at issue or the agency that sold it to the *New York Times*. Later, § 51 was amended to provide that there can be no right of publicity claim against a photographer or other entity based upon the sale of a particular image for use permitted under the statute.

The *Arrington* Court also referenced its earlier decision in *Murray v. New York Mag. Co.*,<sup>18</sup> where the Court rejected a claim under § 51 respecting use of a photograph of a non-Irish plaintiff watching the St. Patrick’s Day parade in so-called Irish garb that appeared on the cover of *New York Magazine*. The photo was held to have properly illustrated an article about contemporary attitudes of Irish-Americans in New York City and the St. Patrick’s Day festivities.

The Court of Appeals addressed this issue again in *Stephano v. News Group Publications, Inc.*<sup>19</sup> In that case, the use of the plaintiff’s photograph in a *New York Magazine* feature called “Best Bets,” which contained information about new and unusual products and services available in the New York City metropolitan area, was held to be a use in a publication concerning events or matters of public interest and was not, as the plaintiff contended, an advertisement of products in disguise.<sup>20</sup> The Court noted that the defendants had submitted evidence that the article was published without consideration for advertising concerns and had not received any payment for including the particular item. The fact that the publication chose to include this photograph to increase circulation and profits did not render it an advertisement in disguise.

In the factually amusing case *Finger v. Omni Publications International, Ltd.*,<sup>21</sup> the husband and wife plaintiffs complained about the use of a photograph of themselves

and their six children to illustrate a magazine article describing caffeine-aided fertilization. The photograph was captioned “Want a big family? Maybe your sperm needs a cup of Java in the morning. Tests reveal that caffeine-spritzed sperm swim faster, which may increase the chances for *in vitro* fertilization.” The article did not mention the names of the plaintiffs or their children, nor did it suggest that the children were produced as a result of caffeine use or *in vitro* fertilization. The Court, citing *Arrington* and *Stephano*, had little trouble concluding that there was a real relationship between the use of the photograph and the article in question and rejected the plaintiffs’ claims.

These principles were reiterated in the factually difficult case *Messenger v. Gruner + Jahr Print. & Publ.*<sup>22</sup> In brief, the defendant used a stock photo of the plaintiff in an article in *YM Magazine* about a supposedly 14-year-old girl who claimed to have become drunk at a party and had sex with three different young men. The plaintiff was not involved in any way in the incidents described in the article. Once again, the Court, citing *Arrington*, *Finger*, *Murray* and other cases, held that there was a real relationship between the photograph and the article it illustrated and was not an advertisement in disguise. The case went on to discuss a line of cases, which will be covered in more depth below, that suggested a cause of action under § 51 might lie if the use was used in a substantially fictionalized way. The Court held that unlike cases that involved fictionalized descriptions of the life of the plaintiff, the article in *YM Magazine* was used to illustrate a newsworthy article.

There are, however, Court of Appeals cases that came out the other way. In *Flores v. Mosler Safe Co.*,<sup>23</sup> the defendant was in the business of manufacturing and selling safes and vaults. It created what the Court described as a “circular” that included reprints of the news article, including photos, captions, and news accounts, describing a building burning and which included several mentions of the plaintiff’s name. Advertising copy was “appended” to the news accounts and photographs encouraging readers to protect their valuables by using one of the defendant’s products. The Court of Appeals rejected the defendant’s contention that the use of the plaintiff’s name was incidental or unrelated to the advertising copy, and held that the plaintiff stated a cause of action under § 51. In so holding, the Court distinguished its decision in *Gautier v. Pro-Football, Inc.*,<sup>24</sup> which had rejected a claim by a well-known animal trainer arising from the television broadcasting of the plaintiff’s animal training act, performed before a professional baseball game. The *Gautier* Court ruled that this was not a commercial use actionable under the statute, even though the broadcast was supported by advertising, and held that the public had a legitimate interest in viewing this special and public event.<sup>25</sup>

There are a couple of other Court of Appeals cases worth a mention. In *Rand v. Hearst Corp.*,<sup>26</sup> the Court of Ap-

peals held that the use of the name of plaintiff Ayn Rand on the cover of a book by author Eugene Vale did not violate § 51. The book cover included a short excerpt from a review of the book that mentioned Rand’s name (“Ayn Rand enjoys the same kind of mystique as Vale . . .”). The Court affirmed the lower court decision holding that this was not a use for advertising or trade purposes under the Civil Rights Law.<sup>27</sup> It is interesting to contrast the *Rand* decision with the decision in *Beverly v. Choices Women’s Medical Center, Inc.*,<sup>28</sup> holding that the use of the plaintiff physician’s name, photo, and title in a calendar designed to promote a Queens medical facility was an advertising use subject to protection under § 51.

In *Shaw v. Time-Life Records*,<sup>29</sup> the recording artist and bandleader Artie Shaw complained that the defendants’ creation, and use of his name to advertise new records that used his arrangements, violated his rights under §§ 50 and 51 of the New York Civil Rights Law. The Court of Appeals noted that Shaw did not own any copyright interest in the arrangements or new recordings and held that a specific exception set forth in § 51 (as amended), permitting the use of the “name, portrait, picture or voice” of an artist in connection with the sale of artistic productions, applied in this case (even though Shaw did not actually perform on the albums).

### **Does the Use in an Otherwise Protected Medium Violate the Statute if It Is Pervaded With Actual Falsity?**

For this topic, we have to go all the way back to 1911, when the Court of Appeals decided *Binns v. Vitagraph Co. of America*.<sup>30</sup> A defendant creator and distributor of motion pictures made a movie about the 1909 collision of two ships at sea. The plaintiff’s name and picture were used in the film. The Court of Appeals upheld the plaintiff’s claims, noting that “in the case before us, the series of pictures were not true pictures of a current event, but mainly the product of the imagination, based, however, largely upon such information relating to an actual occurrence as could readily be obtained.” In other words, the motion picture did not use actual footage of the event depicted, but recreated it in its studios and assigned actors and actresses to play the roles of the actual participants. Undoubtedly, the Court’s analysis, and in all likelihood its holding, would be different today in a time where our view of movie making and the protection accorded to entertainment vehicles has changed.<sup>31</sup>

*Spahn v. Julian Messner, Inc.*<sup>32</sup> involved a supposed biography of Hall of Fame pitcher Warren Spahn. The Court found that the book was filled with invented dialog, imaginary incidents, and attributed thoughts and feelings. The author had never interviewed Spahn, any member of Spahn’s family or even anyone who knew Spahn. The Court of Appeals held that in order to be actionable, an otherwise protected work must be “infected with material and substantial falsification . . . and

published with knowledge of such falsification or with a reckless disregard for the truth.<sup>33</sup>

*Spahn and Binns* both were discussed in the *Messenger* case, described above. The Court of Appeals distinguished the situation there, where a photograph of the plaintiff was used to illustrate and was reasonably related to a newsworthy article, from the *Spahn and Binns* cases, which involved attempts to trade on the persona of an individual “so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception.”<sup>34</sup>

The “pervaded with fiction” concept may still have some real resonance, especially in a world of docudramas and fictionalized biographies. In California, an intermediate appellate court recently reversed a lower court decision and dismissed a claim by Olivia De Havilland that portions of the docudrama “Feud,” which depicted the rivalry between Joan Crawford and Bette Davis, were fictionalized.<sup>35</sup> In New York, much attention has been given to the Third Department’s decision in *Porco v. Lifetime Entertainment Services, LLC*,<sup>36</sup> which ruled at the pleading stage that a convicted murderer stated a claim against the producer of the film “Romeo Killer: The Christopher Porco Story” on the ground that there was substantial fictionalization in the program and the alleged facts made it “reasonable to infer that the producer indicated that the film was considered to be a fictitious program.”<sup>37</sup>

We expect that many of these issues will be the subject of more litigation, especially in light of changes in technology, as well as the public and judicial understanding of what is or is not newsworthy. We also expect continued attempts to modify New York’s statutory protections, mostly designed to provide increased protection for individuals and creators (such as songwriters), and ongoing opposition from news and media organizations on First Amendment and other grounds. We wish EASL another 30 years of leadership in the fields of entertainment, arts, and sports law, and in its ongoing role in shaping debate on cutting edge issues significant to its constituents and to the public.

## Endnotes

1. <https://www.nytimes.com/1902/08/23/archives/the-right-of-privacy.html>.
2. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 542 (1902).
3. *Id.* at 542-43.
4. N.Y. Laws Ch. 132, §§ 1-2 (1903), which subsequently became N.Y. Civ. Rights Law §§ 50, 51. The original 1903 Session law can be viewed at <https://babel.hathitrust.org/cgi/pt?id=nyp.33433090742549;view=1up;seq=320>.
5. Voice was not added until 1995. L. 1995, c. 674, § 1, eff. Nov. 1, 1995.
6. The statute was held to be a constitutional exercise of power in *Rhodes v. Sperry & Hutchinson Company*, 193 N.Y. 223, 226 (1908).
7. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

8. *See, e.g., Gautier v. Pro-Football, Inc.*, 304 N.Y. 354 (1952); *Flores v. Mosler Safe Co.*, 7 N.Y.2d 276 (1959).
9. *Haelan Labs. v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953).
10. *Haelan Labs*, 202 F.2d at 868.
11. *Id.*
12. 63 N.Y.2d 379 (1984).
13. 31 N.Y.3d 111 (2018).
14. 31 N.Y.3d 988 (2018).
15. 56 N.Y.2d 780 (1982).
16. 55 N.Y.2d 433 (1982), *cert. denied*, 459 U.S. 1146 (1983).
17. 55 N.Y.2d at 440 (quoting *Murray v. New York Mag. Co.*, 27 N.Y.2d 406, 409 [1971]).
18. *Murray*, 27 N.Y.2d at 406.
19. 64 N.Y.2d 174 (1984).
20. *See also Freihofer v. Hearst Corp.*, 65 N.Y.2d 135 (1985) (publication by a newspaper of an article detailing court files from a matrimonial action are newsworthy irrespective of any motive by defendant to increase circulation).
21. 77 N.Y.2d 138 (1990).
22. 94 N.Y.2d 436 (2000).
23. 7 N.Y.2d 276 (1959).
24. 304 N.Y. 354 (1952).
25. Somewhat remarkably, the Court of Appeals did not cite or even refer to the United States Supreme Court’s decision in *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562 (1977), which held that the broadcast of the plaintiff’s entire circus act of being shot from a cannon misappropriated his right of publicity under the First and Fourth Amendments.
26. 26 N.Y.2d 806 (1970).
27. In *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341 (1968), the Court of Appeals held that circulation of galley proofs of an upcoming book by its publisher was not a use for “advertising purposes” under the Civil Rights Law.
28. 78 N.Y.2d 745 (1991).
29. 38 N.Y.2d 201 (1975).
30. 210 N.Y. 51 (1913).
31. As a modern example, the 11th Circuit held (based on the answer to a certified question from the Florida Supreme Court), that claims by families of the captain and a crew member of the doomed ship the *Andrea Gail*, featured in the film “The Perfect Storm,” and other fisherman depicted in the film, had no claims for misappropriation and common law false light invasion of privacy, even though the film was a fictionalized account “based on” a true story, as the use was not for “purposes of trade or for any commercial or advertising purpose” under Florida law. *Tyne v. Time Warner Entertainment Co.*, 425 F.3d 1363 (11th Cir. 2005).
32. 21 N.Y. 2d 124 (1967).
33. *Id.* at 127.
34. *Messenger*, 94 N.Y.2d at 446. Note the dissent by Judge Bellacosa that includes a detailed analysis of the prior cases, questioning whether the fictionalization exception still is applicable, and concluding that it is not possible to reconcile the decision in *Messenger* with *Spahn*.
35. *De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845 (Ct. App. 2d. 2018).
36. 147 A.D.3d 1253 (3d Dep’t 2017).
37. *Id.* at 1255.

**Edward H. Rosenthal, partner at Frankfurt Kurnit Klein & Selz, P.C.; and Barry Werbin, counsel at Herrick, Feinstein LLP, are Co-Chairs of the EASL Committee on Publicity, Privacy and Media.**