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# Names and the Right of Privacy

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> A man's name is his own property and he has a right to its use and enjoyment as he has to any other species of property.
> *Brown Chemical Co. v. Meyer,* 139 U.S. 540, 544 (1890).

To advertise a motion picture, a writer in the publicity department of the studio wrote the following letter:

> Dearest:
>
> Don't breathe it to a soul, but I'm back in Los Angeles and more curious than ever to see you. Remember how I cut up about a year ago? Well, I'm raring to go again, and believe me I'm in the mood for fun.
>
> Let's renew our acquaintanceship and I promise you an evening you won't forget. Meet me in front of the Warners Downtown Theatre at 7th and Hill on Thursday. Just look for a girl with a gleam in her eye, a smile on her lips, and mischief on her mind!
>
> Fondly,
> Your ectoplasmic playmate,
> (signed) Marion Kerby

After the publicity genius had composed this missive, it was written in a feminine hand and then reproduced mechanically on pink stationery. One thousand copies of the letter were enclosed in matching pink envelopes, hand-addressed in a feminine hand and sent to 1000 male householders selected by a mailing list agency.

In this same city resided an actress by the name of Marion Kerby. She was the only person listed by that name in both the telephone book and city directory. The name signed at the end of this letter, in addition to being the same as that of the actress mentioned above, was also the same name of the leading actress in the motion picture to be exhibited at the Warners Theatre.

After the letters were delivered to the addressees hundreds of domestic riots occurred when wives who open their husband's mail interpreted the letter as an invitation to an assignation with Marion. The expectations of

lonesome males who were interested in the promised evening were aroused. Marion's home was deluged with telephone calls, telegrams, and letters accepting her offer. There were quite a number of personal visits to her home by some of the men and several wives rang Marion's doorbell.

All of this publicity affected her reputation adversely and she became "nervous, heartsick, had a feeling of disgrace, anguish and depression." There was no question regarding Marion's character and reputation as there was no criticism of her life style. Marion commenced a civil action for the invasion of her right of privacy and prevailed.[1]

Under the law, invasion of the right of privacy is classified as a tort or civil wrong. Its origin may be traced in the early court decisions of England and the United States. However, the right of privacy per se is of recent origin and was not recognized as such until 1890. Prior to 1890 no court had granted a plaintiff monetary or injunctive relief for a cause of action specifically labelled an *action for invasion of the right of privacy.*

A law review article hastened the recognition of this right. Mrs. Samuel D. Warren was the target of a Boston newspaper that specialized in gossip and titillated the pubic with the social activities of the "blue blood" set in that city. Mrs. Warren was very active socially, and the newspaper reported the parties, dinners, the wedding of a daughter of the Warrens, and other social events involving Mrs. Warren in gossipy detail. All of this publicity was offensive to the Warrens, and as a result Samuel D. Warren and Louis D. Brandeis wrote a lengthy article entitled "The Right to Privacy" which was published in the *Harvard Law Review* in 1890.[2]

Warren and Brandeis defined the right to privacy (also described as the right of privacy) as ". . . the right to enjoy life – the right to be let alone . . . ." The article is considered one of the classics of the law and resulted in commencement of litigation which clearly stated that the cause of action was an invasion of the right to privacy. Beginning in the first part of the 20th century, the right of privacy has become a major source of litigation in the United States.

The elements of the tort of invasion of the right of privacy are defined in the *Restatement of the Law Second* of the American Law Institute:[3]

> One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
>
> The right of privacy is invaded by:
>
> *INTRUSION UPON SECLUSION*
>
> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to

liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

*APPROPRIATION OF NAME OR LIKENESS*
One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

*PUBLICITY GIVEN TO PRIVATE LIFE*
One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
(a) would be highly offensive to a reasonable person, and
(b) is not of legitimate concern to the public.

*PUBLICITY PLACING PERSON IN FALSE LIGHT*[4]
One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his right of privacy, if
(a) the false light in which the other was placed would be highly offensive to a reasonable person, and
(b) The actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

*DAMAGES DUE TO INVASION OF THE RIGHT OF PRIVACY*
One who has established a cause of action for invasion of his privacy is entitled to recover [money] damages for
(a) the harm to his interest in privacy resulting from the invasion;
(b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and
(c) special damage of which the invasion is a legal cause.[5]

A summary of some court decisions will provide examples which have recognized the right of privacy by appellate courts of various jurisdictions. The plaintiff prevailed in most, but not all, of these cases.

The first judicial recognition of the right of privacy occurred in 1905 by the Supreme Court of Georgia.[6] Paolo Pavesich commenced a civil action against the New England Mutual Life Insurance Company, its general agent Thomas B. Lumpkin and J.Q. Adams, a photographer, all co-defendants. The photograph of Pavesich was published in the *Atlanta Constitution,* and it was a photographic likeness of Pavesich which would be easily recognized by his friends and acquaintances. By the side of the picture of Pavesich was a picture of an ill-dressed and sickly looking person. Above the photographic reproduction of Pavesich were the words "Do it now. The man who did." Above the picture of the other person were the words, "Do it while you can. The man who didn't." Below the two pictures were the words, "These two pictures tell their own story."

Under the picture of Pavesich the following was printed: "In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and to-day my family is protected and I am drawing an annual dividend on my paid-up policies." Under the other person's picture was a statement to the effect that he had not taken insurance, and now realized his mistake. The statements were signed by "Thomas B. Lumpkin, General Agent."

The photographic negative was obtained from Adams without the knowledge or consent of Pavesich. Also the use of the photograph and publication of the likeness of Pavesich was without his knowledge or consent. The court decided in favor of Pavesich.

A landmark case involved a motion picture portrayal of a former prostitute, who reformed, married and became a housewife and thereafter lived an exemplary life. She was accepted in respectable society and made many friends who were not aware of the incidents of her former life. The motion picture producers photographed and released the film to moving picture theatres which disclosed that it was the true story of the life of the plaintiff and disclosed her true name. When friends of the plaintiff learned for the first time of the unsavory incidents of her early life, this caused them to scorn, abandon her, and expose her to obloquy, contempt, and ridicule, causing her grievous mental and physical suffering. The court ruled in favor of the unfortunate woman.[7]

It is not often a public figure is successful in an action for injunctive relief and money damages. Warren Spahn, a famous baseball player, however, was successful in his action for the invasion of his right of privacy and the unauthorized publication of his biography entitled the *Warren Spahn Story*. In addition to the lack of authorization the author did not interview Spahn, invented dialogue and imaginary incidents, and depended on newspaper clippings and magazine articles. Some of the incidents the author included were laudatory, such as an untrue statement that Spahn won the Bronze Star in combat during World War II. Spahn considered this offensive. The trial judge found gross errors of fact and "all-pervasive distortions, inaccuracies, invented dialogue, and the narration of happenings out of context." Spahn prevailed and a money judgment was entered in his favor, and the publisher was enjoined from publication and dissemination of the book.[8]

In another case, a newspaper published an invitation in the form of an advertisement: "Hot Lips, Deep Throat, Sexy, Young Bored Housewife [available] . . ." The name and address of the housewife was disclosed. Following publication of the advertisement the housewife received numerous visits from potential partners and letters soliciting her to perform sexual acts. The housewife contended that she had not placed the adver-

tisement in the newspaper and that she had never consented to its publication. The housewife was the mother of a young daughter barely in her teens who was exposed to the invasion.

An action was commenced for the invasion of the right of privacy of the mother and also the daughter on the theory that the daughter's right of privacy had been invaded concurrently with that of the mother. There is no question in regard to the invasion of the right of privacy of the mother. The defendants filed a demurrer as to the cause of action on the theory there was no invasion of the right of privacy as to the daughter. On appeal the appellate court decided the daughter's own privacy as well as the mother's was invaded.[9]

One more case may be cited, to illustrate that not every plaintiff who claims an invasion of privacy succeeds. An attorney named Frank M. Swacker filed a civil action claiming his name was published in a book entitled *The Benson Murder Case* and therein portrayed as a district attorney, which position he never held. However, he was a special assistant to the U.S. Attorney General, and his position included prosecuting anti-trust cases; his duties in this position are similar to the duties of a district attorney. In most parts of the book the name "Swacker" only was mentioned.

The court held that "The mere use of the plaintiff's surname and Christian name with his middle initial omitted without any other identifying feature cannot be held a sufficient basis for relief under the statute (providing for relief for an invasion of the right of privacy)." The court stated:

> Apart from the use of the name 'Swacker,' there is not a single parallel between the plaintiff and the character depicted in the book. No person familiar with the plaintiff could possibly infer from a reading of the book [that it is] intended to portray the plaintiff [Frank M. Swacker] or that [his] name was being used for some commercial purpose. The statute was enacted to protect the privacy of persons, not to redress imagined wrongs or to subject authors and publishers to hazards against which it is well-nigh impossible to guard.

Defendant's motion for dismissal of the action was granted.[10]

## SUMMARY AND CONCLUSIONS

1. Consent to publication cancels the cause of action for an invasion of the right of privacy.

2. News of public interest, within the bounds of reason, subordinates the right of privacy to the public's "right to know."

3. If an individual is a public figure, he or she has waived the right of privacy. The Spahn case is exceptional.

4. Oral as well as written publication may support a cause of action for the right of privacy.

5. The law does not provide that a mere annoyance constitutes an invasion of the right of privacy. However, a favorable or overstated laudatory publication which would be embarrassing to a person of reasonable and ordinary sensibilities may be actionable.

6. The usual and ordinary activities of a person are not protected by the right of privacy. The law offers no relief to supersensitive persons.

7. The right of privacy does not protect property rights, although if the right to a name is a property right, then there is a cause of action for the invasion of the right of privacy, but the right of privacy is basically a personal right.

8. The right of privacy is strictly personal. The plaintiff must allege and prove his or her own right of privacy in order to prevail.

9. Truth is not a defense in an action for the invasion of the right of privacy, which is contrary to a lawsuit for libel or slander. Invasion of the right of privacy may also constitute the tort of libel.

10. Proof of malice in support of an action for the invasion of the right of privacy is not required. The mere fact that the publisher did not intend harm or injury to a person is not a defense. Malice is not a necessary element in an invasion of the right of privacy.

11. Mistake is not a defense. For example a person whose picture was published in connection with an advertisement recovered damages, although the picture bore a caption the name of a person other than hers.

12. A corporation has no personal feelings; therefore, it has no right of privacy.

13. Persons convicted of crime forfeit their right of privacy. Persons charged with the commission of crime are subject to publicity, as public interest intervenes and allows publication of the facts. Victims of crime and persons engaged in the detection thereof are within the realm of public interest and lose their right of privacy insofar as the details of the crime are concerned.

14. On the extent and duration of the right of privacy, some courts have held that in instances where a public character has retired, his right of privacy is restored. Therefore, if there is a lapse of time, and a public person has become obscure it would be wise to obtain an opinion from legal counsel before publication of the facts or reproduction of a photograph.

15. Private and social affairs, fashions, the arts, etc., that mention the names or photographs of persons who do not seek or want publicity is deemed a matter of public interest, provided it is not for the purpose of trade or advertising.

16. The accidental mention of a name in a book or other publication is not actionable as an invasion of the right of privacy, especially if it is a common name.

17. The right of privacy does not prohibit the publication of information involving proceedings of courts of justice, legislative hearings, or meetings of any other public body open to the public.

18. Publication of the name or likeness or photograph of a living person for

purposes of trade, advertising, or any commercial venture without written consent is actionable. The New York statute relative to the right of privacy specifically mentions "living person." The legal rule is that the right of privacy expires with the death of a person. Publication without the consent of heirs, administrators, or executors is risky, even though present law indicates that the survivors of the deceased cannot claim an invasion of their right of privacy unless it is possible that their right of privacy is somehow invaded.

19. There are statutes which provide for retraction of libel and slander, but retraction of a truthful fact publicly disclosed is an impossibility. Therefore, retraction is not feasible involving an invasion of the right of privacy.

20. "Emotional distress" is a new tort, and if the publication of the name or photograph of the deceased causes severe emotional distress, trauma, or if the publication is offensive to a reasonable person, it is actionable in some jurisdictions and, therefore, may be a type of extension to the invasion of the right of privacy.

21. The United States Supreme Court decided in 1975 that the right of privacy is inapplicable to the publication of information obtained from court or other public records: "Thus even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record."[11] Whether emotional distress could be the basis of an action is speculative.

## Notes

[1]Kerby v. Hal Roach Studios, 53 Cal. App. 2d 207, 127 P.2d 577 (1942).

[2]4 Harv. L. Rev. 193 (1890).

[3]American Law Institute, 3 *Restatement of the Law* (Second) Torts 2d 652A et seq.

[4]In my opinion a more accurate statement of this principle would be "false characterization" rather than "false light."

[5]"Special damages" refers to costs of medical, services, hospital expenses, and costs of litigation. "General damages" refers to personal injuries. "Punitive damages" refers to sums awarded to punish tortfeasors.

[6]Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S.E. 68 (1905).

[7]Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931).

[8]Spahn v. Julian Messner, Inc., 21 N.Y. 2d 124, 233 N.E. 2d 840 (1967).

[9]Vescovo v. New Way Enterprises, 60 Cal. App. 3d 582, 130 Cal. Rptr. 86 (1976).

[10]Swacker v. Wright, 154 Misc. 822, 277 N.Y. Supp. 296 (1935).

[11]Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 494–495 (1975).