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**Right of Publicity and Privacy Developments**

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1. **New York’s Post-Mortem Right of Publicity and Related Legislation**
	1. **Background:** New York’s right of privacy statute, Civ. Rights L. §§ 50, 51, has existed almost unchanged since 1903.
		1. Limited to uses “for advertising purposes or for the purposes of trade.”
		2. Covered only living individuals.
		3. Did not include statutory exemptions for uses protected by the First Amendment, but case law largely provided the same benefit.
	2. **Efforts to Amend the Law.**
		1. For approximately 20 years, SAG-AFTRA has been seeking new legislation in NY to create a post-mortem right of publicity. In recent years, this effort expanded to also address “digital replicas” and sexually explicit deepfakes.
		2. The Motion Picture Association—concerned that overly expansive legislation could interfere with its members’ ability to make movies and TV shows about and inspired by real people and events—was SAG-AFTRA’s primary foil, along with news organizations, First Amendment Advocates, photographers, broadcasters and others.
		3. With the assistance of Deputy Senate Majority Leader Mike Gianaris, the two sides reached agreement in the early summer of 2020, and the legislature passed the bill with near unanimity.
	3. **What’s Not in the New Law:** The new law does not amend the existing Sections 50 and 51 at all. Those statutes remain on the books and govern the use of **living** individuals’ name, voice, photograph, or likeness in advertisements or for purposes of trade.
	4. **What Is in the New Law:** The new law creates three separate and distinct new rights:
		1. **Post-Mortem Right of Publicity:** New York Civ. Rights Law § 50-f creates a new “right of publicity” for **deceased** individuals who died while domiciled in NY.
			1. This right extends 40 years after death. N.Y. Civ. Rights Law § 50-f (8).
			2. The law covers uses of a “deceased personality’s name, voice, signature, photograph, or likeness…on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases” of such items. *Id.* § 50-f (1)(b).
			3. This right only applies to those whose such attributes “ha[ve] commercial value at the time of his or her death, or because of his or her death.” *Id*.
		2. **Expressive Works Exemption.** The Right of Publicity provision contains a robust expressive works exemption, which excludes from the scope of the new right uses in:

a play, book, magazine, newspaper, or other literary work; musical work or composition; work of art or other visual work; work of political, public interest, educational or newsworthy value, including comment, criticism, parody or satire; audio or audiovisual work, radio or television program, if it is fictional or nonfictional entertainment; or an advertisement or commercial announcement for any of the foregoing works. *Id*. §50-f(2)(d)(i).

It also exempts uses “in connection with any news, public affairs, or sports program or account, regardless of format, medium or means of transmission, or any political campaign.” *Id*. §50-f(2)(d)(iii).

* + 1. **Registry.** As in California and other states, the law establishes a publicly accessible registry for post-mortem rights; rights must be registered to be enforceable. *Id*. §50-f(7).
		2. **Digital Replicas of Deceased Performers.** The law includes a novel right against deceptive uses of a digital replica of a deceased performer who died domiciled in New York. *See id.* § 50-f(2)(b).
			1. This right is more accurately described as a consumer-fraud provision than an intellectual property right.
			2. The provision applies only to uses of a “digital replica,” as defined in Section 50-f(1)(c), in a “scripted audiovisual work as a fictional character or for the live performance of a musical work.” *Id*. §50-f(2)(b).
			3. Only applies “if the use is likely to deceive the public into thinking it was authorized by” specified heirs of the deceased performer. *Id*.
			4. ***Disclaimer.*** No cause of action will lie if the credits for the work contain a “conspicuous disclaimer…stating that the use of the digital replica has not been authorized by” heirs. *Id*.
			5. Digital replica right applies for 40 years after the performer’s death; the registration requirement applies as well. *Id*. §§ 50-f(7)-(8).
			6. ***Exclusions.*** Digital-replica provision contains statutory exemptions, but they are narrower than the exemptions to the right of publicity. Excluded from this scope of this right are uses:
				1. if the work is of parody, satire, commentary, or criticism; works of political or newsworthy value, or similar works, such as documentaries, docudramas, or historical or biographical works, regardless of the degree of fictionalization; a representation of a deceased performer as himself or herself, regardless of the degree of fictionalization, except in a live performance of a musical work; *de minimis* or incidental; or an advertisement or commercial announcement for any of the foregoing works. *Id*. §50-f(2)(d)(ii).
				2. Also excluded are uses “in connection with any news, public affairs, or sports program or account, regardless of format, medium or means of transmission, or any political campaign.” *Id*. §50-f(2)(d)(iii).
				3. The exclusion in Section 50-f(2)(d)(i) for uses in a “play, book, magazine, newspaper…audiovisual work,” etc. do ***not*** apply to the digital replica provision, because this right only applies (if at all) in a “scripted audiovisual work,” there was no reason to explicitly ***exclude*** uses in other types of works.
		3. **Sexually Explicit Deepfakes**
			1. The bill also creates a right against unauthorized sexually explicit deepfakes, which closely resembles the new deepfakes law enacted in California in 2019. N.Y. Civ. Rights Law § 52-c; *see also* Cal. Civ. Code § 1708.86.
			2. ***Cause of Action.*** It establishes cause of action against one who “discloses, disseminates or publishes sexually explicit material [defined in Section 52-c(1)(e)] related to the depicted individual, and the person knows or reasonably should have known the depicted individual in that material did not consent to its creation, disclosure, dissemination, or publication.” N.Y. Civ. Rights Law § 52-c(2)(a).
			3. ***Consent.*** Consent to appear in such a “deepfake” must be granted “knowingly and voluntarily” and pursuant to “an agreement written in plain language that includes a general description of the sexually explicit material and the audiovisual work in which it will be incorporated.” *Id*. §52-c(3)(a). And such an agreement may be rescinded pursuant to the process set forth in the statute.
			4. ***Exemptions.*** The deepfakes provision has its own set of statutory exemptions, excluding from its scope disclosure or publication of such videos “in the course of reporting unlawful activity, exercising the person’s law 52-c(3) enforcement duties, or hearings, trials or other legal proceedings” and where the “sexually explicit material is a matter of legitimate public concern, a work of political or newsworthy value or similar work, or commentary, criticism or disclosure that is otherwise protected by the constitution of this state or the United States; provided that sexually explicit material shall not be considered of newsworthy value solely because the depicted individual is a public figure.” *Id*. §§ 52-c(3)-(4).
			5. The law does not include any explicit parody/satire exemption, but these should be excluded either by “political or newsworthy value or similar work,” “commentary, criticism” or “protected by the constitution” exceptions. *Id.* § 52-c(4).
1. ***Porco v. Lifetime Entm’t Servs., LLC*, 195 A.D.3d 1351, 1352 (3rd Dep’t 2021)**
	1. **The Crime**
		1. In 2004, Peter Porco was murdered and his wife Joan severely injured in an attack in their bed at home in Delmar, New York, an Albany suburb.
		2. Their son Christopher was charged with the murder of his father and attempted murder of his mother, and a jury convicted him in 2006.
		3. Porco was sentenced to 50 years to life on each count and will not be eligible for parole until 2052, when he’ll be 68 years old.
	2. **The Lifetime Docudrama**
		1. In 2013, Lifetime aired *Romeo Killer: The Chris Porco Story*.
		2. It included a disclaimer at the beginning—“Based on a true story”—and at the end, a statement that it was “a dramatization” in which “some names have been changed, some characters are composites and certain other characters and events have been fictionalized.”
	3. **The Lawsuit**
		1. Shortly before the airing, Chris Porco, acting *pro se*, filed a lawsuit in New York Supreme Court, Clinton County, under New York Civil Rights Law §§ 50 and 51, seeking to enjoin the broadcast of the movie.
		2. The Supreme Court granted a Temporary Restraining Order, which the Appellate Division quickly reversed, ruling that the TRO was an impermissible prior restraint. *See Porco v. Lifetime Entm’t Servs., LLC*, 116 A.D.3d 1264 (3rd Dep’t 2014).
		3. The Supreme Court then granted Lifetime’s motion to dismiss, but the Appellate Division reversed, ruling that plaintiff’s allegations of fictionalization were sufficient to survive a motion to dismiss, under *Binns v. Vitagraph Co. of America*, 210 N.Y. 51, 56 (1913), and *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, 128 (1967). *See Porco v. Lifetime Entm’t Servs., LLC*, 147 A.D.3d 1253 (3rd Dep’t 2017). The New York Court of Appeals declined to hear case.
		4. Plaintiff’s mother, Joan Porco, later joined the case as a co-Plaintiff.
		5. After discovery, both sides moved for summary judgment, and the Supreme Court denied both motions.
	4. **The Appeal & Resolution (So Far)**
		1. On June 24, 2021, the Appellate Division reversed and dismissed the case in its entirety. *See Porco v. Lifetime Entm’t Servs., LLC*, 195 A.D.3d 1351, 1352 (3rd Dep’t 2021).
		2. Lifetime’s main argument was that its docudrama fit under the longstanding exception for “newsworthiness”—that is, that Section 50/51 do not apply to “reports of newsworthy events or matters of public interest.”
		3. The newsworthiness exception is limited, in turn, by the *Binns/Spahn* exception, which applies where the work consists of a “materially and substantially fictitious biography where a knowing fictionalization amounts to an all-pervasive use of imaginary incidents,” culminating in “a biography that is nothing more than an attempt to trade on the persona of the plaintiff.”
		4. The Appellate Division discussed the nature of docudramas, “a genre that ‘deal[s] freely with historical events[,] especially of a recent and controversial nature’ by crafting a dramatic presentation that could, in theory, mislead the viewer into believing that it was entirely accurate.”
		5. The Court ruled that “the sensational facts of the crime, the investigation and the trial of Christopher Porco are indisputably events of public interest, and the film therefore qualifies as newsworthy,” further explaining:

…the film is a dramatization that at times departed from actual events, including by recreating dialogue and scenes, using techniques such as flashbacks and staged interviews, giving fictional names to some individuals and replacing others altogether with composite characters…. The film nevertheless presents a broadly accurate depiction of the crime, the ensuing criminal investigation and the trial that are matters of public interest.

* + 1. The disclaimers at the beginning and end of the movie also played an important role. As the Court explained, “the film makes no effort to present itself as unalloyed truth or claim that its depiction of plaintiffs was entirely accurate, instead alerting the viewer at the outset that it is only ‘[b]ased on a true story’ and reiterating at the end that it is ‘a dramatization’ in which “some names have been changed, some characters are composites and certain other characters and events have been fictionalized.’”
	1. **Current Status.** Plaintiffs filed a notice of appeal as of right to the Court of Appeals on the theory that the Third Department’s decision “directly involved the construction of the constitution” under CPLR 5601(b)(1). The Court is now examining its jurisdiction, and both sides filed letters in late August arguing their positions on this issue. Lifetime’s view is that there is no appeal as of right because the Third Department ruled on statutory grounds only and did not need to reach the First Amendment issue directly.
	2. **Upshot.** New York retains its strong protection for docudramas and similar works, especially if producers make clear that the work contains fictionalized elements and is not meant to be taken 100% literally. **Disclaimers matter**.
1. ***Carter v. Mannion*, No. 2:21-CV-04848-PA- KSx (C.D. Cal., filed June 15, 2021)**
	1. **Overview.** Jay-Z—rapper, mogul, and Beyoncé’s husband—brought a common law right of publicity claim against photographer Jonathan Mannion, whom Jay-Z had hired to photograph him in 1996, when Jay-Z’s career was in its early days.
	2. **Claims.** Jay-Z claims that Mannion has “developed a highly profitable business” by continuing to sell copies of photos of Jay-Z on his website and in his retail store without his consent, long after they worked together. He also claims that Mannion is improperly licensing his image and selling products that use his likeness, without permission. Jay-Z sought compensatory damages and punitive damages, plus a preliminary and a permanent injunction.
	3. **Defenses.** Mannion responded with a motion to dismiss and to strike pursuant to California’s Anti-SLAPP law. He emphasized that a victory for Jay-Z would jeopardize the output of any photographer whose work captures the likeness of celebrity clients. His primary arguments were:
		1. That he owns the copyright to the photos because he took them, and Jay-Z’s ROP claims are preempted by the Copyright Act because Mannion retains the rights to reproduce, distribute, and create derivative works stemming from his photos.
		2. That the ROP claim was preempted by the First Amendment.
			1. Under California law, an artist can raise an affirmative defense that the work is “protected by the First Amendment inasmuch as it contains significant transformative elements” or “the value of the work does not derive primarily from the celebrity’s fame.” *See* Mot. to Dismiss at 19 (Aug. 5, 2021), Dkt. 26.
			2. Here, Mannion claimed that he transformed the literal image of Jay-Z into a work of art of his own through his choices in composition, angles, lighting, etc. *Id.* at 21-22.
		3. That his conduct fell within the bounds of California’s anti-SLAPP law because the photos were an exercise of free speech and Jay-Z is the subject of widespread public interest.
	4. **Denial of Anti-SLAPP Motion.** On September 8, 2021, the Court denied Mannion’s motion to dismiss and to strike, ruling that, at this stage:
		1. Jay-Z had alleged sufficient facts that Mannion could not obtain dismissal based on an alleged transformative use.
		2. Jay-Z’s allegation that Mannion was selling t-shirts and slip mats was enough to survive a motion to dismiss based on copyright preemptions, though the Court suggested claims based on sales of photos standing alone would be preempted under *Maloney v. T3Media, Inc.*, 853 F. 3d 1004 (9th Cir. 2017). *See* Court Order (Sept. 8, 2021), Dkt. 39.
2. ***Knapke v. PeopleConnect Inc.*, No. 2:21-cv-00262-MJP, 2021 U.S. Dist. LEXIS 150249 (W.D. Wash. Aug. 10, 2021)**
	1. **Claims.** Knapke sued Peopleconnect, the operator of Classmates.com, for using her name and photograph in advertisements on its website without her consent. She asserted a single claim under Ohio’s Right of Publicity statute, Ohio Rev. Code Ann. § 2741.02.
	2. **Defenses.** Classmates argued for dismissal on the basis of seven arguments: that Knapke was bound to arbitrate the claim; that her claim was barred by the Communications Decency Act (“CDA”); that it was preempted by the Copyright Act; that she did not have a viable claim under the Ohio Right of Publicity law; that her claim fell within an exemption to the Right of Publicity law; that Classmates was protected under the First Amendment; and the dormant Commerce Clause. 2021 U.S. Dist. LEXIS 150249, at \*3.
	3. **Order.** The Court denied Classmates’ motion to dismiss, as follows:
		1. The Court rejected Classmates’ CDA argument, ruling that Classmates, in this context, was a content producer.
		2. Classmates had argued that Knapke lacked a viable right of publicity claim because she did not allege that any user of the website had seen the ad containing her photo. The Court rejected this argument, ruling that ROP claims are based on the defendant’s use of the image, not whether any third-party viewed it. Classmates also argued that Knapke’s photo had no intrinsic commercial value, but the Court rejected that argument as well, citing the use of the photograph in an advertisement as evidence of its commercial value. *Id*. at \*14-15.
		3. The Court also rejected Classmates argued that Ohio’s ROP law did not apply extraterritorially, meaning that Knapke could sustain her claim only if she alleged that someone in Ohio saw the advertisement. *Id.* at \*16-17.
		4. The Court ruled that some of the disputed ads were exempt from Ohio’s ROP law because they were advertisements of literary works (yearbooks), but advertisements for Classmate’s subscription services were not exempt. *Id.* at \*18-19. The public affairs exception to ROP also didn’t apply.
		5. Finally, Ohio’s ROP law did not violate the First Amendment—even if the ad at issue here were considered protected commercial speech, the ROP law “directly and appropriately advances Ohio's substantial interest in enabling its citizens to protect the non-consensual commercial exploitation of their likeness without overbroadly prohibiting commercial speech.” *Id.* at \*23.
3. ***Spencer Elden v. Nirvana, L.L.C., et al.*, No. 21-cv-06836-FMO-AGR (C.D. Cal., filed Aug. 24, 2021)**
	1. **Overview.** Plaintiff, whose photograph as an infant was used on the iconic cover of Nirvana’s Nevermind album, has sued Nirvana, Universal Music Group, Inc., Warner Records, Inc., the David Geffen Company, and the individual art director and members of Nirvana (or their estates), claiming that the photograph constituted child pornography and/or an invasion of his right of privacy.
	2. **Allegations.**
		1. The photograph at issue shows Elden, four months old at the time, naked in a swimming pool, reaching for a dollar bill on a fishhook.
		2. Elden, who has appeared for (clothed) recreations of the photograph in years since, now claims that the photograph “depicts a lascivious exhibition” of his genitals, Compl. ¶ 108 (Aug. 24, 2021), Dkt. 1, and constitutes “commercial child sexual exploitation of him,” *id.* ¶ 3. He contends that the album covers were part of a “commonly utilized” “promotion scheme’ that “posed children in a sexually provocative manner to gain notoriety, drive sales, and garner media attention, and critical reviews.” *Id.* ¶ 10.
		3. In the Complaint, Elden alleges that prior to the use of this photograph, “Nirvana was a relatively unknown local grunge band,” *Id.* ¶ 95, and that his “image created massive commercial success for Nirvana, for which Spencer never received any compensation.”
		4. He also claims that neither he nor his legal guardians ever signed a release “authorizing the use of any images of Spencer or of his likeness, and certainly not of commercial child pornography depicting him.”
		5. Based on these allegations, Elden asserted six claims: (1) Civil Remedy for Personal Injuries by Child Pornography, 18 U.S.C. § 2255(a); (2) Violation of 18 U.S.C. § 1595, relating to sex trafficking; (3) Negligence; (4) Distribution Of Private Sexually Explicit Materials, in violation of 3 Cal. Civ. Code 1708.85; (5) Intrusion into Private Affairs; and (6) Invasion of Privacy under California Constitution.
	3. **Defenses.** At the time of drafting, defendants have not appeared, but common questions in discussions of the case include, whether the photograph constitutes child pornography, whether the photograph was intended to be lascivious or sexual or as a comment on commercialism or greed (as it has often been understood), and what consent was required and/or provided, for privacy concerns.
1. Special thanks to Azeezat Adeleke, third-year law student at Stanford University and recent summer associate with Ballard Spahr LLP, for her assistance in preparing these materials. [↑](#footnote-ref-1)