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Civil Rights--Right of Privacy (Gautier v. Pro-Football, Inc., 106 N.Y.S.2d 553 (1st Dep't 1951))

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RECENT DECISIONS

CIVIL RIGHTS—RIGHT OF PRIVACY.—The plaintiff sued for damages alleging that defendants used his name and picture in violation of Section 51 of the Civil Rights Law.[1] Plaintiff, a showman and producer of trained animal acts, performed between the halves of a professional football game, pursuant to a contract with the owner of the home team. The defendant broadcasting company, despite prior formal objections, included the act in the telecast. Commercial announcements were made before and after the act. Plaintiff's name was used in the accompanying dialogue which was merely descriptive and reportorial. *Held,* judgment for plaintiff reversed. The use of plaintiff's name and picture was not a use "for advertising purposes" nor "for the purposes of trade" within the meaning of the statute. Section 51 was not intended to protect the value of one's act but only to guard against injury to one's personality through an unlawful invasion of the limited right of privacy. *Gautier v. Pro-Football, Inc.,* 106 N. Y. S. 2d 553 (1st Dep't 1951).

The lower court made the observation that the use of a television camera rather than an ordinary camera for the projection of plaintiff's image was immaterial.[2] It appears evident that pictures taken and used in connection with newspaper or newsreel coverage of the game, and events incidental thereto, would not constitute violations of Section 51.[3] It is submitted that, in treating the lack of exploitation in the commercial announcements analogously to a newspaper article placed entirely apart from any advertisement, the holding may well reach a proper result. The fact that the physical segregation is measured by time rather than space should not, it may be argued with some force, be the basis of distinction. Treating the telecast of a public event similarly to newspaper coverage, and applying the principles applicable thereto, may provide reasonably adequate solutions to problems created by this new medium.

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[1] N. Y. CIVIL RIGHTS ACT § 51. "Any person whose name, portrait or picture is used . . . for advertising purposes or for the purposes of trade without the written consent first obtained . . . may maintain an equitable action . . . against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. . . ."

[2] *See* Gautier v. Pro-Football, Inc., 198 Misc. 850, 852, 99 N. Y. S. 2d 812, 814 (N. Y. City Ct. 1950).

[3] *Cf.* Binns v. Vitagraph Co., 210 N. Y. 51, 56, 103 N. E. 1108, 1110 (1913) (newspaper); Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 473, 178 N. Y. Supp. 752, 756 (1st Dep't 1919) (newspaper and newsreel).

It may be argued that although the actual methods of factual dissemination differ, the motivating forces and economic factors influencing both media are quite similar. Newspaper publishers present items of general interest to maintain circulation and thereby attract advertisers who provide income.[4] Similarly television presentations are the result of a desire to achieve "ratings" conducive to the attraction of sponsors. Considerations of this sort would tend to support the view that telecasters should have privileges equal to those afforded newspaper publishers. In neither field should the statute prohibit the use of material which is of legitimate public or general interest.[5] It must be borne in mind, however, that television is a new product of our mechanical age, one whose ramifications are as yet little understood, and for that reason it may be dangerous to analogize its problems too much to those of other media.

The fact that this new medium possesses the capacity for instantaneous transmission, magnifies its importance as a news source. The courts have demonstrated a reluctance to pass judgment on the content of the news.[6] It would seem that this reluctance should vary inversely with the possibility of abuse,[7] and since television dialogue may not deviate markedly from the activity being transmitted, the abuse of the reportorial function is even less likely than with other media.

It has been indicated that the players or spectators at public events would not be protected by the statute.[8] Argument may therefore be made that since the individuals in attendance have surrendered their right of privacy because of the public nature of such assemblies, a professional performer, who has coveted the limelight similarly may not seek protection of his privacy from invasion.[9]

There has been judicial indication that despite the fact the statute is penal in part, it should be liberally construed.[10] However, the

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[4] "All publications presumably are operated for profit and articles contained therein are used with a view to increasing circulation." Serge Koussevitzky v. Allen, Towne & Heath, Inc., 188 Misc. 479, 483, 68 N. Y. S. 2d 779, 783 (Sup. Ct.), *aff'd mem.*, 272 App. Div. 759, 69 N. Y. S. 2d 432 (1st Dep't 1947).

[5] *See* Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 474, 178 N. Y. Supp. 752, 757 (1st Dep't 1919) (newsreel and newspaper); Sarat Lahiri v. Daily Mirror, Inc., 162 Misc. 776, 782, 295 N. Y. Supp. 382, 389 (Sup. Ct. 1937) (newspaper); Jeffries v. N. Y. Evening Journal Pub. Co., 67 Misc. 570, 571, 124 N. Y. Supp. 780, 781 (Sup. Ct. 1910) (newspaper).

[6] *Cf.* Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 474, 178 N. Y. Supp. 752, 757 (1st Dep't 1919).

[7] "The public policy involved in leaving unhampered the channels for the circulation of news and information is considered of primary importance, subject always, of course, to the common-law right of redress for libel." Sarat Lahiri v. Daily Mirror, Inc., 162 Misc. 776, 781, 295 N. Y. Supp. 382, 388 (Sup. Ct. 1937).

[8] *Cf.* Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 473, 178 N. Y. Supp. 752, 756 (1st Dep't 1919).

[9] See Note, 15 Mo. L. REV. 48 (1950).

[10] Jackson v. Consumer Publications, Inc., 169 Misc. 1022, 10 N. Y. S. 2d

courts, perhaps influenced by the fact that a common law right of privacy was denied in New York,[11] have been loath to extend a remedy to any situation other than those which fall within the confines of the statute.[12] The decision in the instant case is another indication of that tendency towards restrained judicial interpretation of the statute.

CONFLICT OF LAWS—DOMESTIC RELATIONS—JURISDICTION TO AWARD CUSTODY WHERE CHILD IS TEMPORARILY OUTSIDE STATE.—Plaintiff and defendant were domiciled in Ohio. As a result of *in personam* proceedings instituted in that state, plaintiff was awarded temporary custody of her minor child, ancillary to a final decree of divorce. The child had been sporadically cared for by the paternal great-grandfather in Pennsylvania, and was in fact sent there four days before the divorce action. The Ohio decree provided that the child continue his residence in Pennsylvania, but expressly reserved jurisdiction to subsequently relitigate the issue of custody. Six months later the plaintiff was awarded exclusive custody of the child by the Ohio court. Prior thereto, the defendant had taken up residence with his child in Pennsylvania where the plaintiff now institutes habeas corpus proceedings. The trial court refused to grant custody to the plaintiff in the interest of the child's welfare. The Superior Court reversed, holding that the Ohio decree was entitled to full faith and credit. *Held,* judgment reversed. The decree of the Ohio court need not be accorded full faith and credit since the foreign court had no jurisdiction over the child, who was residing in Pennsylvania at the time the decree was awarded. *Commonwealth* ex rel. *Graham v. Graham,* 80 A. 2d 829 (Pa. 1951).

There has developed a sharp divergence of judicial opinion concerning the jurisdictional requirements necessary to empower a court to award custody of minor children. Some courts have designated residence of the child within the state as the criterion.[1] It is rea-

691 (Sup. Ct. 1939); Sarat Lahiri v. Daily Mirror, Inc., 162 Misc. 776, 295 N. Y. Supp. 382 (Sup. Ct. 1937).

[11] Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442 (1902).

[12] Binns v. Vitagraph Co., 210 N. Y. 51, 103 N. E. 1108 (1913); Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 N. Y. Supp. 752 (1st Dep't 1919); Wallach v. Bacharach, 192 Misc. 979, 80 N. Y. S. 2d 37 (Sup. Ct.), *aff'd mem.,* 274 App. Div. 919, 84 N. Y. S. 2d 894 (1st Dep't 1948); Wilson v. Brown, 189 Misc. 79, 73 N. Y. S. 2d 587 (Sup. Ct. 1947); Swacker v. Wright, 154 Misc. 822, 277 N. Y. Supp. 296 (Sup. Ct. 1935); Jeffries v. N. Y. Evening Journal Pub. Co., 67 Misc. 570, 124 N. Y. Supp. 780 (Sup. Ct. 1910).

[1] Thrift v. Thrift, 54 Mont. 463, 171 Pac. 272 (1918); Finlay v. Finlay, 240 N. Y. 429, 148 N. E. 624 (1925); Ritchison v. Ritchison, 28 Tenn. App. 432, 191 S. W. 2d 188 (1946).