Privacy and Information Security Law

Randy Canis

CLASS 4

Privacy and the Media pt. 2

C. DISSEMINATION OF FALSE INFORMATION

2

Defamation

- Defamation occurs when one's words reflect negatively upon another person's integrity, character, good name and standing in the community and those words tend to expose the other person to public hatred, contempt or disgrace. … Defamation includes both libel and slander.
- **Libel** – writing or other permanent form
- **Slander** – orally
- See Missouri Bar's News Reports Handbook.

3

Liability for Defamation

To create liability for defamation there must be:

a) a false and defamatory statement concerning another;

b) an unprivileged publication to a third party;

c) fault amounting at least to negligence on the part of the publisher; and

d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Restatement (Second) of Torts §558.

4

Libel v. Slander

- (1) **Libel** consists of the publication of defamatory matter by **written or printed words**, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.
- (2) **Slander** consists of the publication of defamatory matter by **spoken words**, transitory gestures or by any form of communication other than those stated in Subsection (1).
- Restatement §568.

5

Damages for Libel

- General damages are presumed
- Need to prove actual injuries

6

Damages for Slander

- Plaintiff must prove special damages-actual economic or monetary loses unless slander per se (for which damages are presumed)

7

Slander Per Se

1. Statement that another person has a loathsome disease
2. Statement that another has committed improprieties while engaging in a profession or trade
3. Statement that another has committed or has been imprisoned for a serious crime
4. A statement that a person is unchaste or has engaged in serious sexual misconduct

8

Publisher and Distributor Liability

- **Publisher liability** – repeating or publishing the libelous statements of others
- **Distributor liability** – merely disseminating a libelous statement
  - Distributors cannot be found liable unless they knew or had reason to know about the defamatory statement

9

Communications Decency Act

- Immunizes online service providers from postings, e-mails, and other Internet contributions made by others
- Section 230 of CDA “No provider … of interactive computer services shall be treated as the publisher or speaker of any information provided by another information content provider”

10

Zeran v. America Online, Inc.

- Background
  - Offensive Oklahoma City bombing t-shirt advertisements
  - Internet Bulletin Board posting had Zeran’s home phone number, even though he had nothing to do with the shirt
  - Continued postings and continued harassment of Zeran
  - Radio station broadcast information about the advertisement and Zeran’s phone number

11

Zeran v. America Online, Inc.

- Zeran sues AOL and the radio station
- AOL defended with CDA (47 U.S.C. §230) as an affirmative defense
- DC grants AOL’s summary judgment

12

Zeran v. America Online, Inc.

- “The relevant portion of § 230 states: ‘No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.’ 47 U.S.C. § 230(c)(1).”

13

Zeran v. America Online, Inc.

- "By its plain language, §230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, §230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider **liable for its exercise of a publisher's traditional editorial functions** — such as deciding whether to publish, withdraw, postpone or alter content — are **barred**."

14

Zeran v. America Online, Inc.

- Does this mean Internet service providers should not remove offensive or infringing content?
  - "Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. … [] § 230 **forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions**."

15

Zeran v. America Online, Inc.

- "AOL falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by §230's immunity. …"

16

Hassell v. Bird

- Basis for the appeal
  - "Respondents Dawn Hassell and the Hassell Law Group (Hassell) obtained a judgment holding defendant Ava Bird liable for defamation and requiring her to remove defamatory reviews she posted about Hassell on Yelp.com, a Web site owned by appellant Yelp, Inc. (Yelp). The judgment also contains an order requiring Yelp to remove Bird's defamatory reviews from its Web site (the removal order). Yelp, who was not a party in the defamation action, filed a motion to vacate the judgment which the trial court denied."

17

Hassell v. Bird

- Background
  - Bird engaged Hassell for PI representation
  - Hassell withdraws from representation
  - Bird publishes a Yelp review about Hassell
  - Hassell disagrees with the review and demands correction or removal
  - Possible additional fake review posted by Bird

18

Hassell v. Bird

- "Hassell alleged causes of action against Bird for defamation, trade libel, false light invasion of privacy, and intentional infliction of emotional distress."
- Hassell seeks damages, an injunction, and removal of defamatory reviews
- Hassell served Bird, Bird did not respond, and Hassell obtained a default judgement

19

Hassell v. Bird

- "'Hassell was awarded general and special damages and costs totaling $557,918.75, but was denied punitive damages. The Bird judgment also awarded Hassell injunctive relief pursuant to the following provisions:
  - 'Plaintiffs' Request for Injunctive Relief is Granted. Defendant AVA BIRD is ordered to remove each and every defamatory review published or caused to be published by her about plaintiffs HASSELL LAW GROUP and DAWN HASSELL from [Y]elp.com and from anywhere else they appear on the internet within 5 business days of the date of the court's order.'"

20

Hassell v. Bird

- "'Yelp.com is ordered to remove all reviews posted by AVA BIRD under user names "Birdzeye B." and "J.D." attached hereto as Exhibit A *and any subsequent comments of these reviewers* within 7 business days of the date of the court's order.' (Italics added.)"

21

Hassell v. Bird

- Yelp refuses to comply because "(1) Yelp was a nonparty to the litigation; (2) Yelp was immune from liability for it publication of a review; and (3) Hassell failed to properly serve Bird or prove its defamation claims against her."

22

Hassell v. Bird

- "Yelp would 'revisit its decision' if it was presented with stronger evidence. [Yelp] also warned that Hassell's 'threats' of litigation against Yelp were not well taken because Yelp would file a motion to dismiss and recover attorney fees under the anti-SLAPP law, 'as it has done in the past in similar cases.'"

23

Hassell v. Bird

- "Yelp then argued the trial court was required to vacate the Bird judgment because: (1) Hassell's failure to name Yelp as a party defendant violated Yelp's right to due process; (2) Yelp was immune from liability for posting Bird's reviews pursuant to the CDA, 47 United States Code section 230; (3) the judgment violated section 580 by awarding relief that Hassell did not request in their complaint; and (4) the judgment subverted Bird's First Amendment rights by suppressing speech that Hassell failed to prove was defamatory."

24

Hassell v. Bird

- "On September 29, 2014, the court filed an order denying Yelp's motion to set aside and vacate the judgment (the September 2014 order)."

25

Hassell v. Bird

- “In order to claim a First Amendment stake in this case, Yelp characterizes itself as a publisher or distributor. But, at other times Yelp portrays itself as more akin to an Internet bulletin board—a host to speakers, but in no way a speaker itself. Of course, Yelp may play different roles depending on the context. However, in this context it appears to us that the removal order does not treat Yelp as a publisher of Bird’s speech, but rather as the administrator of the forum that Bird utilized to publish her defamatory reviews.”

26

Hassell v. Bird

- “Here, we address the very different situation in which specific speech has already been found to be defamatory in a judicial proceeding. Yelp does not cite any authority which confers a constitutional right to a prior hearing before a distributor can be ordered to comply with an injunction that precludes re-publication of specific third party speech that has already been adjudged to be unprotected and tortious.”

27

Hassell v. Bird

- “[A]n injunction that is entered following a determination at trial that the enjoined statements are defamatory does not constitute a prohibited prior restraint of expression because ‘”[o]nce specific expressional acts are properly determined to be unprotected by the [F]irst [A]mendment, there can be no objection to their subsequent suppression or prosecution.’”

28

Hassell v. Bird

- “[T]he trial court had the power to make the part of this order requiring Yelp to remove the three specific statements that were set forth in the exhibit A attachment to the Bird judgment because the injunction prohibiting Bird from repeating those statements was issued following a determination at trial that those statements are defamatory. However, to the extent the trial court additionally ordered Yelp to remove subsequent comments that Bird or anyone else might post, the removal order is an overbroad prior restraint on speech.”

29

Hassell v. Bird

- “Section 230 was enacted as an amendment to the CDA. Originally, the primary objective of the CDA was to restrict the exposure of minors to indecent materials on the Internet. However, through the addition of section 230, the CDA acquired a second objective of furthering First Amendment and e-commerce interests on the Internet.”

30

Hassell v. Bird

- “Accordingly, section 230 has been construed broadly to immunize ‘providers of interactive computer services against liability arising from content created by third parties.’ … As elucidated in a leading decision by the Fourth Circuit, section 230 also ‘precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, **lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred**.’”

31

Hassell v. Bird

- "California courts have also construed section 230 to afford interactive service providers broad immunity from tort liability for third party speech. …
- "Concluding that section 230 confers 'broad immunity against defamation liability for those who use the Internet to publish information that originated from another source,' the Barrett court held that the statute 'prohibits "distributor" liability for Internet publications.'"

32

Hassell v. Bird

- "There are three essential elements that a defendant must establish in order to claim section 230 immunity" from California tort liability. … 'They are "(1) the defendant [is] a provider or user of an interactive computer service; (2) the cause of action treat[s] the defendant as a publisher or speaker of information; and (3) the information at issue [is] provided by another information content provider.'"

33

Hassell v. Bird

- "Yelp argues the authority summarized above establishes that the removal order is void. We disagree. The removal order does not violate section 230 because it does not impose any liability on Yelp. In this defamation action, Hassell filed their complaint against Bird, not Yelp; obtained a default judgment against Bird, not Yelp; and was awarded damages and injunctive relief against Bird, not Yelp."

34

Other Options?

- Sue the poster of the content (instead of the source where it is published)

35

Libel Requirements

1. Libel was published,
2. Words were of and concerning plaintiff, [Identification]
3. Material is defamatory,
4. Material is false, and
5. Defendant was at fault.

36

Publication Requirement

- Defamatory statements are communicated to persons other than the defamed party.
- Court will presume communication from inclusion in the newspaper, on television, or on the Web
- Distributors of the final product ordinarily cannot be held liable

37

Identification

- Plaintiff may be explicitly named
- Use of a similar name that suggests the plaintiff's name
- Descriptive circumstances where a sufficient number of people will understand that the person being referenced is the plaintiff

38

Defamatory Material

- Focus on words
  - Words that are libelous on their face
  - Innocent on their face but becomes defamatory by knowledge of other facts
- Are the particular words capable of conveying a defamatory meaning, and would a reasonable person interpret the words as being a defamatory comment?

39

Falsity

- Public Person v. Private Person
  - **Public** – must prove the statement is untruthful
  - **Private** – must prove falsity only when the statement of the subject is a matter of public concern
- Evidence provided to court must go to the heart of the charge

40

Public Figures

- Public figures are "fair game" and false and defamatory statements about them that are published in the press will not constitute defamation unless the statements are made with actual malice
- **Actual malice** – with either knowledge of its falsity or a reckless disregard of the truth

41

Defense

- Truth is normally an absolute defense
- Privilege
  - **Absolute** – judicial proceedings and certain government proceedings
  - **Conditional** – certain statements made in good faith and the publication is limited to those who have a legitimate interest in the communication

42

New York Times Co. v. Sullivan

- "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not. …"

43

Gertz v. Robert Welch, Inc.

- Background
  - Welch publishes American Opinion magazine
  - Magazine published an article claiming things about Gertz which were offensive and not true
  - Gertz won a jury verdict of 50K, D.C. entered judgment for Welch based on a different standard

44

Gertz v. Robert Welch, Inc.

- "[W]hether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements. …"

45

Gertz v. Robert Welch, Inc.

- "We hold that, so long as they do not impose liability without fault, the **States may define** for themselves the appropriate **standard of liability** for a publisher or broadcaster of defamatory falsehood injurious to a **private individual.** …"

46

Gertz v. Robert Welch, Inc.

- Restrict plaintiffs who do not prove knowledge of falsity or reckless disregard to compensation for actual injury
- No justification for allowing punitive damages against publishers and broadcasters

47

Gertz v. Robert Welch, Inc.

- "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, **an individual should not be deemed a public personality for all aspects of his life**. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."

48

When Does Someone Become a Public Figure?

- "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. … A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times. …*"

49

Publicity Placing Person in False Light

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 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.

50

False Light v. Defamation

- **Defamation** – reputational injury; communication to another person
- **False Light** – exclusively for emotional distress; wider communication

51

Forms of False Light

- Misleading statements
- Examples of possibilities:
  - Mostly true story is somewhat embellished
  - Photograph is used out of context

52

Time, Inc. v. Hill

- Background
  - Hill family held prisoner for 19 hours but were treated courteously by their convicts; convicts later killed by police
  - Became a basis for a book, movie, and play called "The Desperate Hours"
  - Life ran an article indicting that the renditions are what occurred to the Hill family; Hill family sues

53

Time, Inc. v. Hill

- "Factual error, content defamatory of official reputation, or both, are insufficient for an award of damages for false statements unless **actual malice** — knowledge that the statements are false or in reckless disregard of the truth — is alleged and proved. …"

54

Time, Inc. v. Hill

- "We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."

55

Infliction of Emotional Distress

- One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

56

Hustler Magazine v. Falwell

- "'Outrageousness'" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An 'outrageousness' standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience."

57

Hustler Magazine v. Falwell

- "We conclude that public figures and public officials may **not recover** for the tort of **intentional infliction of emotional distress** by reason of publications such as the one here at issue without showing in addition that the publication contains a **false statement of fact which was made with 'actual malice**,' *i.e.,* with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a 'blind application' of the *New York Times* standard … it reflects our considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment."

58

Synder v. Phelps

- Background
  - Westboro Baptist Church found liable for picketing near a soldier's funeral
- Issue
  - Does the 1st Amendment shield church members from tort liability for their speech?

59

Synder v. Phelps

- "To succeed on a claim for intentional infliction of emotional distress in Maryland, a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress. …"

60

Synder v. Phelps

- "Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt."

61

Synder v. Phelps

- "[T]he jury verdict imposing tort liability on Westboro for intentional infliction of emotional distress must be set aside."

62

Synder v. Phelps

- "In most circumstances, 'the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, . . . the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'"

63

D. APPROPRIATION OF NAME OR LIKENESS

64

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.

65

New York Civil Rights §50

- "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."

66

New York Civil Rights §51

- "Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained . . . may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use …"

67

Cal. Civ. Code § 3344

- "Any person who knowingly uses another's name, photograph or likeness, in any manner, for purposes of advertising . . . or for purposes of solicitation of purchases of products . . . without . . . prior consent . . . shall be liable for any damages."

68

Right of Publicity v. Appropriation of Likeness

- **Appropriation** – private people whose interests being protected are in terms of emotional distress
- **Right of Publicity** – protects exclusive right to exploit commercial value that attaches to their identities by virtue of their celebrity

69

Cause of Action

- The elements that the plaintiff must prove in a right of publicity case are:
  (1) defendant used name or likeness as a symbol of the celebrity's identity,
  (2) without the plaintiff's consent, and
  (3) with the intent to obtain a commercial advantage.

Appropriation of the Right of Publicity

- Appropriation can include:
  - Unauthorized testimonials
  - Endorsements
- Appropriation may be:
  - Name
  - Physical likeness
  - Voice

Exploitation

- Exploitation may include a variety of things that may implicate endorsement:
  - Photographs
  - Drawings
  - Phrases
  - Activities

Right of Publicity in MO

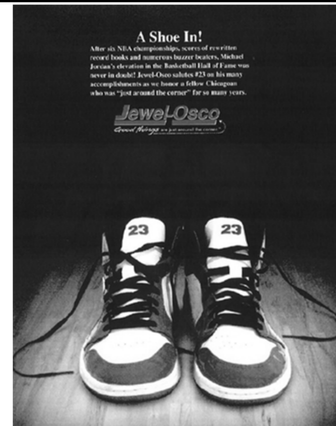
- "In Missouri, 'the elements of a right of publicity action include:
  (1) That defendant used plaintiff's name as a symbol of his identity
  (2) without consent
  (3) and with the intent to obtain a commercial advantage.'"

  C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818 (8th Cir.)

Jordan v. Jewel Food Stores, Inc.

- Background
  - SI comemerative issue featuring Michael Jordan
  - Jewel got free advertising space from SI in exchange for in-store placement
  - Jewel accepted and had a full page congratulating MJ

74



75

Jordan v. Jewel Food Stores, Inc.

- MJ
  - $5 million lawsuit
  - alleging violations of the federal Lanham Act, the Illinois Right of Publicity Act, the Illinois deceptive-practices statute, and the common law of unfair competition.
- Jewel
  - 1st Amendment; ad is “noncommercial” speech

76

Jordan v. Jewel Food Stores, Inc.

- Is the speech commercial or noncommercial?
  - “[T]he commercial/noncommercial distinction is potentially dispositive. If the ad is properly classified as commercial speech, then it may be regulated, normal liability rules apply (statutory and common law), and the battle moves to the merits of Jordan’s claims. If, on the other hand, the ad is fully protected expression, then Jordan agrees with Jewel that the First Amendment provides a complete defense and his claims cannot proceed. The district court held that the ad was fully protected noncommercial speech and entered judgment for Jewel.”

77

Jordan v. Jewel Food Stores, Inc.

- 7th Circuit reverses
  - Logo
  - Marketing slogan
- “[T]he ad is properly classified as a form of **image advertising** aimed at promoting the Jewel-Osco brand. The ad is commercial speech and thus is subject to the laws Jordan invokes here.”

78

Jordan v. Jewel Food Stores, Inc.

- “Even if Jewel’s ad qualifies as noncommercial speech, it’s far from clear that Jordan’s trademark and right-of-publicity claims fail without further ado. According to a leading treatise on trademark and unfair-competition law, there is no judicial consensus on how to resolve conflicts between intellectual property rights and free-speech rights; instead, the courts have offered “a buffet of various legal approaches to [choose] from.” … The Supreme Court has not addressed the question, and decisions from the lower courts are a conflicting mix of balancing tests and frameworks borrowed from other areas of free-speech doctrine.”

79

Jordan v. Jewel Food Stores, Inc.

- “Current doctrine holds that commercial speech is constitutionally protected but governmental burdens on this category of speech are scrutinized more leniently than burdens on fully protected noncommercial speech.”

80

Jordan v. Jewel Food Stores, Inc.

- “Commercial speech is ‘speech that proposes a commercial transaction.’”
- “Speech that does *no more than* propose a commercial transaction ‘fall[s] within the core notion of commercial speech,’ … but other communications also may ‘“constitute commercial speech notwithstanding the fact that they contain discussions of important public issues[]”’…”

81

Jordan v. Jewel Food Stores, Inc.

- “[T]he Supreme Court has ‘“made clear that advertising which **links a product to a current public debate** is not thereby entitled to the constitutional protection afforded noncommercial speech.”’”

82

Jordan v. Jewel Food Stores, Inc.

- “We have read *Bolger* as suggesting certain guideposts for classifying speech that contains both commercial and noncommercial elements; relevant considerations include ‘whether:
  (1) the speech is an **advertisement**;
  (2) the speech **refers to a specific product**; and
  (3) the speaker has an **economic motivation** for the speech.’”

83

Jordan v. Jewel Food Stores, Inc.

- “Jewel’s ad served two functions: congratulating Jordan on his induction into the Hall of Fame and promoting Jewel’s supermarkets.”
- “This commercial message is implicit but easily inferred, and is the dominant one.”

84

Jordan v. Jewel Food Stores, Inc.

- “But an ad congratulating a famous athlete **can only be understood as a promotional device for the advertiser**. Unlike a community group, the athlete needs no gratuitous promotion and his identity has commercial value. Jewel’s ad cannot be construed as a benevolent act of good corporate citizenship.”

85

Jordan v. Jewel Food Stores, Inc.

- “We only recognize the obvious: that Jewel had something to gain by conspicuously joining the chorus of congratulations on the much-anticipated occasion of Jordan’s induction into the Basketball Hall of Fame. Jewel’s ad is commercial speech.”

86

Jordan v. Jewel Food Stores, Inc.

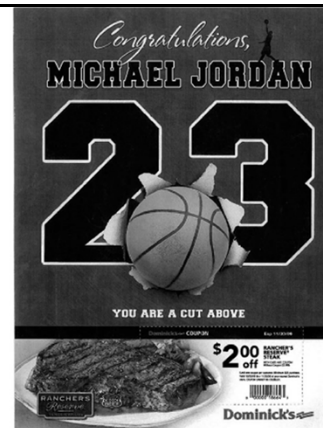
- “Nothing we say here is meant to suggest that a company cannot use its graphic logo or slogan in an otherwise noncommercial way without thereby transforming the communication into commercial speech. Our holding is tied to the particular content and context of Jewel’s ad as it appeared in the commemorative issue of *Sport Illustrated Presents*.”

87

Case Against Dominick’s

- On case with Dominick’s
  - “‘I didn't do deals for anything less than $10 million.’ the billionaire basketball legend confidently testified in a trial of his lawsuit against defunct supermarket chain Dominick's. ‘I have the final say-so with everything that involves my name and my likeness ... there's no decision that happens without my final approval.’”
- http://www.chicagotribune.com/business/ct-michael-jordan-dominicks-case-0819-biz-20150818-story.html

88



89

Amount Awarded

- “Michael Jordan doesn’t need $8.9 million, but that’s what he’s won in a suit filed against the now-defunct Dominick’s grocery store chain over use of his name in an advertisement some six years ago.”
- http://www.bizjournals.com/chicago/news/2015/08/24/michael-jordans-win-over-dominicks-could-be.html

90

Dryer v. NFL

- 8th Cir.
- Case history
  - The district court granted the NFL’s motion for summary judgment and 8th Cir. Affirmed.
- Issue
  - Does the licensing of films featuring former NFL players violate the players right of publicity rights?

91

Dryer v. NFL

- "The suit alleged that the NFL's **use of footage of games in which these players participated violates the common law and statutory rights of publicity of various states**. The players brought claims for injunctive relief and damages under these laws as well as a claim for unjust enrichment. The players further claimed that the NFL's use of images depicting them playing football violates the Lanham Act, 15 U.S.C. §1125."

92

Dryer v. NFL

- Original settlement
  - "NFL established both a fund for the benefit of all former professional players and a licensing agency to assist those players in exploiting their publicity rights."
- Players in this suit opted out

93

Dryer v. NFL

- Findings at D.C.
  - Copyright preempted these right of publicity claims
  - First amendment trumps because the films are expressive, non-commercial speech
  - Falls within newsworthiness or public interest safe harbors
  - Implied consent to the creation and publication

94

Dryer v. NFL

- "The appellants do not argue that NFL Films lacked permission to record appellants' live performances in NFL games. Nor do they dispute that the NFL maintains an enforceable copyright in the footage that NFL Films gathered during those games. Because the appellants do not challenge the NFL's use of their likenesses or identities in any context other than the publication of that game footage, we hold that the appellants' right-of-publicity claims challenge a 'work . . . within the subject matter of copyright.'"

95

Dryer v. NFL

- "[W]e recognized three factors that govern whether speech is commercial rather than expressive: '(i) whether the communication is an advertisement, (ii) whether it refers to a specific product or service, and (iii) whether the speaker has an economic motivation for the speech.' …
- [W]e agree with the district court's conclusion that the films are expressive, rather than commercial, speech and that the Copyright Act therefore preempts the appellants' claims."

96

Post-Mortem Publicity Rights

- "[T]he overwhelming majority of states in the United States have also recognized a postmortem dimension to the publicity right. The publicity right can be inherited, sold in whole or in part, and otherwise licensed after the subject's death. The question of whether or not these interests were exploited during a party's life is irrelevant. A survey of the duration of the postmortem right in the United States found periods ranging from a potentially unlimited period to 100 years to 20 years."

97

Commercial Use Only?

98

Commercial v. Non-Commercial

- "Under §652C of the Restatement, plaintiffs can recover 'damages when their names, pictures or other likenesses have been used without their consent to advertise a defendant's product, to accompany an article sold, to add luster to the name of a corporation or for some other business purpose.' However, there is **no actionable appropriation of a person's likeness claim 'when a person's picture is used to illustrate a noncommercial, newsworthy article.'** … Whether a communication is commercial or noncommercial is a question of law. …"
- Raymen v. United Senior Association, Inc.

99

Girls Gone Wild

- Appropriation of Likeness or participation in an expressive work?
  - "[I]t is also irrefutable that while Lane's image and likeness were used to sell copies of *Girls Gone Wild,* her image and likeness were never associated with a product or service unrelated to that work. Indeed, in both the video and its commercial advertisements, Lane is never shown endorsing or promoting a product, but rather, as part of an expressive work in which she voluntarily participated."

100

Connection to Matters of Public Interest

- Unlike the tort of public disclosure, the lack of newsworthiness is not an element of the appropriation tort. However, appropriation protects against the "commercial" exploitation of one's name or likeness, not the use of one's name or likeness for news, art, literature, parody, satire, history, and biography.

101

"Real Relationship" Test

- "A picture illustrating an article on a matter of public interest is not considered used for the purpose of trade or advertising within the prohibition of the statute **unless it has no real relationship to the article, or unless the article is an advertisement in disguise**. … The test of permissible use is not the currency of the publication in which the picture appears but whether it is illustrative of a matter of public interest."

102

Finger v. Omni Publications International, Ltd.

- Background
  - Use of picture of a family without consent in conjunction with an article discussing a research project related to caffeine-aided fertilization
  - P sued for violation of NY Civil Rights Law §§50 and 51

103

Finger v. Omni Publications International, Ltd.

- Defense
  - Picture did not relate to trade or advertising but to illustrate an article on fertility
  - “Defendant contended that because fertility is a topic of legitimate public interest, its use of the picture fit within the ‘newsworthiness exception’ to the prohibitions of Civil Rights Law §50.”

104

Finger v. Omni Publications International, Ltd.

- “Although the statute does not define ‘purposes of trade’ or ‘advertising,’ courts have consistently refused to construe these terms as encompassing publications concerning **newsworthy events or matters of public interest**. Additionally, it is also well settled that ‘“[a] picture illustrating an article on a matter of public interest is not considered used for the purpose of trade or advertising within the prohibition of the statute . . . unless it has **no real relationship to the article** . . . or unless the article is an advertisement in disguise.”’

105

Finger v. Omni Publications International, Ltd.

- Plaintiff
  - Photo has no relationship to the article b/c they did not participate in research discussed in the article

106

Finger v. Omni Publications International, Ltd.

- “**[T]here is a ‘real relationship’** between the fertility theme of the article and the large family depicted in the photograph. That the article also discusses in vitro fertilization as being enhanced by ‘caffeine-spritzed sperm’ does no more than discuss a specific aspect of fertilization and does not detract from the relationship between the photograph and the article.”

107

Finger v. Omni Publications International, Ltd.

- “[T]he ‘newsworthiness exception’ should be liberally applied. . . . [Q]uestions of ‘newsworthiness’ are better left to reasonable editorial judgment and discretion; judicial intervention should occur only in those instances where there is ‘no real relationship’ between a photograph and an article or where the article is an ‘advertisement in disguise.’”

108

E. PRIVACY PROTECTION FOR ANONYMITY AND RECEIPT OF IDEAS

109

Anonymity

- "Anonymity (or the use of pseudonyms) involves people's ability to conduct activities without being identified."
  - Invocation of 1st Amendment right to protect oneself from being identified.
  - When should anonymity be removed?

110

Restriction on Distribution of Handbills

- "[T]here are times and circumstances when States may **not** compel members of groups engaged in the dissemination of ideas to **be publicly identified**. … The reason [] was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."
- Talley v. State of California

111

McIntyre v. Ohio Elections Commission

- Background
  - Distribution of leaflets related to school tax levy
  - Official said unsigned leaflets violate OH law
  - School official filed a complaint and imposed a fine of $100

112

McIntyre v. Ohio Elections Commission

- "[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."

113

McIntyre v. Ohio Elections Commission

- "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest. …"

114

McIntyre v. Ohio Elections Commission

- "Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. **Anonymity is a shield from the tyranny of the majority.** It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation — and their ideas from suppression — at the hand of an intolerant society. …"

115

Doe v. Cahill

- Background
  - Statements posted on forum critical/insulting on Cahills
  - Cahills get IP addresses for postings associated with the blog and get a court order to have Comcast reveal identities of posters
  - Posters were notified by Comcast before release of information and filed for a protective order to prevent release of names

116

Doe v. Cahill

- Speech over the Internet is entitled to 1st Amendment protection, including anonymous Internet speech. However, the 1st Amendment does not protect defamatory and libelous speech.

117

Doe v. Cahill

- “[W]e hold that a defamation plaintiff must satisfy a ‘summary judgment’ standard before obtaining the identity of an anonymous defendant.”
- “[T]here is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics.”

118

Doe v. Cahill

- “Moreover, when a case arises in the internet context, the plaintiff must post a message **notifying the anonymous defendant of the plaintiff’s discovery request** on the same message board where the allegedly defamatory statement was originally posted.”

119

Doe v. Cahill

- “[W]e hold that as a matter of law a reasonable person would not interpret Doe’s statements as stating facts about Cahill. **The statements are, therefore, incapable of a defamatory meaning.** Because Cahill has failed to plead an essential element of his claim, he *ipso facto* cannot produce *prima facie* proof of that first element of a libel claim, and thus, cannot satisfy the summary judgment standard we announce today.”

120

Standards for Unmasking Anonymous Speakers

a) Motion to Dismiss Standard
b) Prima Facie Case Standard
c) Summary Judgment Standard
d) Variable Standard

121

Program Completed

© 2015-2016 Randy L. Canis

122