



PRIVACY CAUSES OF ACTION

1. COMMON LAW CAUSES OF ACTIONS

a. Invasion of Plaintiff's name or likeness in advertising

- i. *Also referred to as: Misappropriation, Right to Publicity*
- ii. Common Law

1. Elements

a. Use of name or likeness

- i. Must be the plaintiff and plaintiff must be able to show he or she was the person referred to in the advertising.¹

b. Without Consent

- i. Consent is a complete defense. However, known persons, celebrities, etc., do not waive their right to publicity by virtue of being famous.²

c. To Imply Endorsement of Defendant's Product

- i. In New York, the activity must be an advertisement for the purpose of financial gain,³
 1. New York has a **Statutory Right to Recover**⁴
- ii. Courts have held in other jurisdictions that infringement may occur even if activity is not for profit, but is simply for defendant's own benefit.⁵

iii. Recent New York Cases

1. *Apakporo v. Daily News*, 102 A.D.3d 814, 958 N.Y.S.2d 445 (2013).

- a. **Holding:** Defendant's action did not constitute misappropriation because Plaintiff failed to show that his photo was used for advertising or trade purposes.
- b. **Facts:** Daily News published a photo of the plaintiff alongside an article regarding a real property transaction involving the plaintiff. Plaintiff could not show that article was connected to an advertisement as required by N.Y. Civil Rights Law §50.⁶

¹ *Shamsky v. Garan, Inc.*, 167 Misc. 2d 149, 632 N.Y.S.2d 930 (Sup. 1995).

² *Palmer v. Schonhorn Enterprises, Inc.*, 96 N.J. Super. 72 (Ch. Div. 1967).

³ *Cardy v. Maxwell*, 169 N.Y.S.2d 54 (Sup. 1957).

⁴ See McKinney's Civil Rights Law § 50: "A person, firm, name 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"

⁵ See Restatement (Second) of Torts §652C, comment b (1997).

⁶ McKinney's, *supra* note 4, states, "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."

2. ***Krupnik v. NBC Universal, Inc.*, 37 Misc.3d 1219(A), 964 N.Y.S.2d 60 (2010).**
 - a. **Holding:** Complaint dismissed for failure to state cause of action because Plaintiff signed a release of her image for “any and all purposes,” including commercial use and expressly waived claims for misappropriation of the right of privacy and publicity, even though Defendant was not a party to the release.
 - b. **Facts:** Plaintiff was a model who took photos for “Bikini.com” and signed a release for use of her photo for “any and all” purposes including commercial use. Defendant, NBC, used Plaintiff’s image in a fake brochure in the film *Couples Retreat*. Plaintiff’s release barred her claim even though she did not expressly authorized the use of her photo by NBC or in the film, nor did it matter that NBC was not party to her release.
3. **Compare: *Yasin v. Q-Boro Holdings, LLC*, 27 Misc.3d 1214(A), 910 N.Y.S.2d 766 (2010).**
 - a. **Holding:** Plaintiff granted a permanent injunction against Defendant’s use of her photograph on a book cover because there was no relationship between plaintiff and the subject matter of the book and the use was solely for marketing and trade purposes without the plaintiff’s permission.
 - b. **Facts:** Plaintiff’s photo was used on the cover of a book jacket without her permission. While Plaintiff had hired a photographer to take her picture for purposes of promoting her songwriting career, she never signed a release. Defendant could not rely on the constitutionally-protected exception for “work of art” because the court did not consider the photo on the book jacket a work of art, but rather was purely for marketing and trade purposes.

b. **False Light**

i. Elements

1. **Publicity**

- a. Meaning, public at large, rather than “publication” as required by Defamation, to a third person⁷

2. **Of a Major falsehood**

- a. Note: If substantially true, the defendant is not liable for not having cast the plaintiff in the most favorable light⁸

3. **About the Plaintiff**

- a. The Plaintiff must be reasonably identifiable from the private facts disclosed⁹

⁷ *Anderson v. Fisher Broadcasting Companies, Inc.*, 300 Or. 452, 712 P.2d 803, 809 (1986); also means more than simply “gossip”.

⁸ *Machleder v. Diaz*, 801 F.2d 46, 55 (2d Cir. 1986).

4. **That Would Be Highly Offensive to a Reasonable Person**
 - a. Objective standard, does not protective the hypersensitive plaintiff¹⁰
- ii. **Application to New York**
 1. New York does not recognize a tort of “false light.” New York only recognizes cases for **defamation** and for **misappropriation**.
 - a. *See Howell v. New York Post Co., Inc.*, 81 N.Y.2d 115, 596 N.Y.S.2d 350 (1993): “While courts of other jurisdictions have adopted some or all of these torts, in this State the right to privacy is governed exclusively by sections 50 and 51 of the Civil Rights Law; we have no common law of privacy.”
- c. **Intrusion**
 - i. Elements
 1. **Intentional Intrusion**
 - a. Defendant must “intend as a result of his conduct that there be an intrusion upon another’s solitude or seclusion”¹¹
 2. **Upon the Solitude or Seclusion of another that is**
 - a. Must be an expectation of privacy, not matters that occur in a public place or in the public eye¹²
 3. **Highly Offensive to a Reasonable Person**
 - a. Same standard as above
 - ii. **Application to New York**
 1. As previously stated, New York does not recognize a common law cause of action for intrusion. *See also Ava v. NYP Holdings, Inc.*, 20 Misc.3d 1108(A), 866 N.Y.S.2d 90 (2008) (Plaintiff unable to state a cause of action for invasion of privacy because New York does not recognize other common law actions of privacy).
 - a. In some cases however, plaintiff may be able to establish a claim for **Intentional Infliction of Emotional Distress**, which in New York, has the following elements:
 - i. Extreme and outrageous conduct;
 - ii. Intending to cause OR disregarding a substantial probability of causing, severe emotional distress;
 - iii. Causation;
 - iv. Plaintiff suffers Severe emotional distress.¹³
 - b. Like most claims for IIED, difficult to meet standards. *See, i.e., Michael S. Oakley, M.D., PC v. Main Street America Group*, 40 Misc.3d 1204(A) (N.Y. Sup. 2013) (Plaintiff’s

⁹ *Bernstein v. National Broadcasting Co.*, 129 F.Supp. 817 (1955).

¹⁰ *See Bitsie v. Walston*, 85 N.M. 655 (1973).

¹¹ *Knight v. Penobscot Bay Medical Center*, 420 A.2d 915, 918 (Me. 1980).

¹² *Fogel v. Forbes, Inc.*, 500 F. Supp. 1081 (1980).

¹³ *Ava v. NYP Holdings, Inc.*, 20 Misc. 3d 1108(A), 866 N.Y.S.2d 90 (2008), *citing Howell v. New York Post Co.*, 81 N.Y.2d 115, 122 (1993).

claim dismissed for failure to show defendant's conduct was intentional. Plaintiff stated in affidavit she misconstrued defendant's conduct) and *Curtis-Shanley v. Bank of America*, 109 A.D.3d 634 N.Y. Sup. 2013) (Plaintiff failed to establish Defendant-bank's denial of credit was so extreme in degree to go beyond all bounds of human decency.)"

d. **Public Disclosure of Private Facts**

i. Elements

1. **Publicity**

a. Same as "False Light," more than just mere dissemination to another

2. **Of Private Facts**

a. Facts exposed were "kept hidden from the eye"¹⁴

3. **About the Plaintiff**

a. Like "False Light," Plaintiff also must be reasonably identifiable

4. **That would be highly offensive to a reasonable person**

a. Same standard as above

ii. **Application to New York**

1. As stated above, is not recognized in New York. In *Griffin v. Law Firm of Harris, Beach, Wilcox Rubin and Levey*, the court concludes that the legislature did not intend to include in Civil Rights Law §50 any of the other privacy torts not concerning appropriation, including, use of plaintiff's name or information for non-commercial uses.¹⁵

e. **Relation to Other Laws**

i. **Communications Decency Act, §230(e)**

1. Bars intrusion upon seclusion, public disclosure of private fact and false light claims.¹⁶

2. OVERVIEW OF FEDERAL LAWS

a. **Privacy Act of 1974**

i. General Provisions

1. Prevents disclosure by government to third parties

2. Allows individuals to file requests for own information

3. Suits are brought against government agencies

a. Employees are subject to both civil and criminal for unlawful disclosure¹⁷

¹⁴ See *Fry v. Ionia Sentinel-Standard*, 101 Mich. App. 725, 300 N.W.2d 687, 690 (1980); because Plaintiff has no reasonable expectation of privacy of facts open to the public.

¹⁵ *Griffin v. Law Firm of Harris Beach, Wilcox, Rubin and Levey*, 126 Misc.2d 209, 481 N.Y.S.2d 963 (1984).

¹⁶ See *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 302-4, 36 Media L. Rep. (BNA) 1577, 86 U.S.P.Q.2d 1294, 2008 DNH 58 (D.N.H. 2008). Specifically, these claims were barred in a case involving a fabricated personal ad.

- b. Subject to certain exemptions
 - i. Investigatory material for law enforcement purposes
 - ii. Investigatory material for purpose of determining employment suitability
 - iii. Other evaluation purposes for federal and military employment
 - iv. Other purposes as required by statute
- ii. **Privacy Act Litigation**
 - 1. Causes of Action (Civil Remedies §552a(g))
 - a. **Damages for Violation of Prohibition of Disclosure**
 - i. Elements
 - 1. Information from a **record** covered by the Act
 - 2. **Agency** disclosed the information
 - 3. Disclosure had an **adverse effect on Plaintiff**
 - 4. Disclosure was **willful or intentional**¹⁸
 - ii. **Cases**
 - 1. *Bechhoefer v. U.S. Dept. of Justice D.E.A.*, 209 F.3d 57 (2nd Cir. 2000), holding that letter written by a member of a land use group to the Drug Enforcement Agency was a “record” within the meaning of the Privacy Act, in sum, “record” is meant to be construed broadly. Letter here contained personal information about the officer.
 - 2. *Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122 (2nd Cir. 2008), holding that a third party collection company is not an agency of the government subject to civil suits under the Privacy Act.
 - 3. *Pennyfeather v. Tessler*, 431 F.3d 54 (2nd Cir. 2005), holding that (1) Privacy Act does not give Plaintiff a cause of action against a municipal or state employee and (2) information that is related to public employment and that is not *highly personal*, including plaintiff’s name, address, work schedule and social security number during an employment hearing, does not violate Plaintiff’s privacy.
- b. **Actions Where Agency Denies a Right of Access Granted Under the Act**

¹⁷ 5 U.S.C.A. § 552a.

¹⁸ *Quinn v. Stone*, 978 F.2d 126 (1992).

- i. Individuals are granted certain rights under the act in §552(a)(d)(1)

- 1. **Rights**

- a. Amend information under the Act
 - b. Gain access to own information including
 - i. Record under the Act or
 - ii. Any information *pertaining* to the individual under the Act

- 2. **Judicial Review**

- a. After an individual has made a request and been denied to either amend information or request information,
 - b. Right to review,
 - c. If after review, request is still denied, individual has a right to judicial review.
 - d. **Cause of Action**
 - i. According to *Zeller v. U.S.*, 467 F.Supp 487 (1979), Petitioner must merely show:
 - ii. (1) Individual within the meaning of the act;
 - iii. (2) Type of request guaranteed under the Act was denied.

- 3. **Recent Cases**

- a. *Public Employees for Environmental Resp. v. U.S. Environmental Protection Agency*, 2013 WL 677672, holding that organizations and corporations do not have rights under the Privacy Act.
 - b. *Bickford v. Government of U.S.*, 808 F. Supp.2d 175 (D.C. Cir. 2011), holding that before seeking judicial review under the Privacy Act, a Plaintiff must first exhaust administrative remedies.

- c. Remedies

- i. Actual Damages

- 1. Available for intentional or willful violations of the Act

- a. Includes special damages for proven pecuniary loss.
 - b. **But not** damages for mental or emotional distress.
 - c. *See, specifically F.A.A. v. Cooper*, 132 S.Ct 1441 (2011), holding that while Privacy Act does allow for actual damages, it does not include damages for civil or emotional distress.
 - ii. Costs of the Action, including reasonable attorney's fees
 - 1. When Plaintiff proves "intentional and willful acts" on behalf of agency
- b. **Computer Matching and Privacy Protection Act of 1988**, Amendments 1990
 - i. First Amendment to the Privacy Act to include **automated** (computerized) records
 - 1. Bring non-federal agencies within the ambit of the Privacy Act when working with a federal agency¹⁹
 - ii. Purpose to create procedural uniformity by
 - 1. Setting out specific guidelines for agencies to follow when engaged in automated, computer matching activities
 - a. **Computer matching:** a computerized comparison of two or more automated system of records, or one system of records with non-Federal records, generally for the purpose of determining eligibility for federal programs or recouping payment under those federal programs)
 - b. No record in these systems may be disclosed unless:
 - i. Written agreement between source and recipient agency²⁰
 - 1. Specifying purpose and legal authority for use of record
 - 2. Including justification
 - 3. Description of records to be matched
 - 4. Procedure for providing notice to applicants of Federal benefits programs
 - 5. Procedures for verifying any info obtained
 - 6. How the info will be retained, and then destroyed
 - 7. Prohibits duplication and/or redisclosure of information obtained
 - 8. Information regarding accuracy of records to be used

¹⁹ *Id.* at § 552a(o).

²⁰ 5 U.S.C. §552a(o)

9. Gives Comptroller General access to all records to monitor compliance.
- iii. in access of automated records and
 1. Provide Due Process for subjects of automated records
 2. Provide guidelines (oversight) to non-federal agencies working on behalf of or in conjunction with federal agencies
- iv. Requirements
 1. Approval of a written agreement
 2. Notice to any record subjects
 3. Prepare a report to Congress and/or a Federal Register Notice

3. INTERNET PRIVACY

a. Children's Online Privacy Protection Act (1998)

- i. Summary: Unlawful to collect personal information from a child. Sets standards by which operators of websites and online services must comply if:
 1. Targeted at children under the age of 13; and
 2. Operated with actual knowledge that they are collecting, using, disclosing personal information from children under the age of 13.
- ii. Requirements
 1. Post a clear online privacy policy;
 2. Post a direct notice to parents and obtain parental consent;
 3. Give parents a choice of whether or not to disclose information;
 4. Give parents an opportunity to review any personal information;
 5. Give parents opportunity to prevent use of child's personal information;
 6. Take steps to maintain confidentiality of any provided personal information; and
 7. Retain personal information only as long as necessary, then delete.
- iii. Amendments
 1. Rule amended July 2013, adding new categories to **personal information**
 - a. Geolocation information
 - b. Photos or videos with child's image or voice
 - c. Screen name or user name
 - i. If it functions in the same manner as online contact information²¹
 - d. Persistent Identifiers
 - i. "That can recognize users over time and across different websites or online services, where such persistent identifiers is used for functions other than or in addition to support for internal operations of the website or online service."
 1. Gives examples of cookies, gather IP addresses.

²¹ See 16 CFR part 312, available at <http://ftc.gov/os/2012/12/121219copparulefrn.pdf>.

b. **Electronic Communications Privacy Act**

i. Protects designated privileged communications, thus expanding the Wiretap Act:

1. **Electronic communications**,²² including:

- a. Video
- b. Text
- c. Audio
- d. Data

2. **Elements**

- a. Any **person** who
 - i. Includes both government agents and any individuals, companies or corporations²³
- b. **Intentional** interception or attempted interception
 - i. Inadvertent conduct not enough
- c. Of **electronic communications**
 - i. See “privileged communications” above
- d. That is not specifically authorized²⁴

ii. **Penalties**

1. Criminal

- a. Not more than 5 years or \$250,000 for individuals; \$500,000 for organizations²⁵

2. Civil

- a. Plaintiff may be entitled to equitable relief and damages including:
 - i. Punitive damages, reasonable attorneys’ fees and litigation costs
 - ii. Equal to the greater of:
 - 1. Actual damages (\$100 per day of violation) or
 - 2. \$10,000²⁶

iii. **Second Circuit Cases**

- 1. *United States v. Jiau*, 794 F.Supp.2d 484 (S.D.N.Y. 2011), holdings that a co-conspirator’s consent to recording telephone conversations and instant messaging was sufficient consent for defendant and was not a violation of §2511.
- 2. *DeVittorio v. Hall*, 347 Fed.Appx. 650 (2nd Cir. 2009), holding that a video recorder placed in police officers’ locker room did not violate ECPA, because there was no evidence the video recorder was used to record their conversations.

iv. **Stored Communications Act**

²² 18 U.S.C. §2511(2)(g).

²³ 18 U.S.C. 2510(6).

²⁴ 18 U.S.C. 2511(1).

²⁵ 18 U.S.C. 2511(4)(a).

²⁶ 18 U.S.C. 2520(b),(c).

1. Similar to first section of the **ECPA** above, protects:
 - a. Email, voicemail, and the similar
2. **Elements**
 - a. Intentionally accessing;
 - b. Without authorization or having exceeded authorization;
 - c. A facility through which an electronic communication is provided; and
 - d. Obtaining or altering or preventing access to
 - e. A communication while it is in the **storage system**.²⁷
 - i. Courts differ on what is included in the definition of a “storage system”
 1. Defined in the statute as “any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and . . . any storage of such communication . . . for purposes of backup protection of such communication.”²⁸
 2. Ex: Debatable whether employee’s emails on a company server constituted a storage system.²⁹
3. **Penalties**
 - a. Similar to EPCA penalties listed above. Persons liable for breach are exposed to both **civil** and **criminal** penalties.
- v. Update: Recent federal court cases indicate this may also cover non-public Facebook posts³⁰
 - a. Dependent on the privacy settings the user has chosen.
- vi. **More Recent Cases**
 1. *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F.Supp.2d 548 (S.D.N.Y. 2008), holding that an employer’s access of employee’s personal emails, stored and accessed and directly maintained by an outside electronic communication service provider and unauthorized by the employees, violated the SCA, and that each account accessed was a singular violation of the SCA (*Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp*, 759 F.Supp.2d 417 (S.D.N.Y. 2010)).
 2. *Conte v. Newsday, Inc.*, 703 F. Supp.2d 126 (E.D.N.Y. 2010), holding that a route distributor of emails cannot “intercept”

²⁷ 18 U.S.C. 2701(a); *see also*, *State Analysis, Inc. v. American Financial Services Ass’n*, 621 F.Supp.2d 309, 317-18 (E.D.Va 2009).

²⁸ *Id.*

²⁹ *See KLA-Tencor Corp. v. Murphy*, 717 F.Supp.2d 895 (N.D. Cal. 2010).

³⁰ *See Ehling v. Monmouth-Ocean Hospital Service Corp.*, available at <http://articles.law360.s3.amazonaws.com/0467000/467335/Ehling.pdf>. Here the plaintiff had chosen settings that made her page inaccessible, except to her selected friends.

communications as required by SCA, because they are the intended recipients.

vii. New York's Privacy Statute includes **access of electronic communications**.³¹

c. **Proposed Amendments (2013)**

i. Amends 1986 Act (see above)

1. Prohibits the provider of (1) remote computing service or (2) electronic communication service from
2. Knowingly disclosing to any governmental entity contents of a **communication** either (1) in electronic storage or (2) otherwise maintained by provider³²

ii. Status

1. Act introduced: Mar. 19, 2013 by Sen. Patrick Leahy
 - a. Co-Sponsors: Mike Lee, Rand Paul, Mark Udall
2. Status: Reported by Committee on April 25; Referred to Senate Judiciary on May 7.

iii. Expands the warrant requirement for government agencies.³³

If you have any questions regarding the issues discussed in this outline, please contact W&M principal Olivera Medenica at (212) 785-0070.

³¹ N.Y. Penal Law §250.05.

³² [http://thomas.loc.gov/cgi-](http://thomas.loc.gov/cgi-bin/bdquery/D?d113:41:./temp/~bdYigA:@@L&summ2=m&/home/LegislativeData.php)

[bin/bdquery/D?d113:41:./temp/~bdYigA:@@L&summ2=m&/home/LegislativeData.php](http://thomas.loc.gov/cgi-bin/bdquery/D?d113:41:./temp/~bdYigA:@@L&summ2=m&/home/LegislativeData.php)

³³ See "Electronic Communications Privacy Act Amendments Act of 2013," available at <http://www.leahy.senate.gov/download/ecpa-bill-2013>, last visited Sep. 3, 2013.