AUTHORS' INTRODUCTION TO THE 2025 EDITION OF THE RIGHTS OF PUBLICITY AND PRIVACY

Some of the key developments in the field of publicity and privacy law covered in this 2025 edition are:

- **Tennessee Overhauls Its Publicity Statute.** Forty years after adopting its first right of publicity statute, Tennessee adopted the Ensuring Likeness Voice and Image Security Act, or ELVIS Act, thoroughly overhauling its right of publicity. The new law extends protection to imitations of voice, including those produced by digital means such as artificial intelligence, explicitly protects against the use of name, voice, or likeness in imitative performances, and narrows some of the exceptions to liability. *See §§ 6:126-127*.
- **California and Illinois Forbid AI-Generated Replicas in Movies and Sound Recordings.** Artificial intelligence permits creators to "insert" lifelike replicas of both living and long-gone actors and musicians into their works. For instance, one might choose to create an entirely new movie based on an original script featuring a digitally resurrected James Earl Jones, who passed away in 2024. To avoid any confusion about whether this constitutes the use of the relevant person's "voice" or likeness California and Illinois amended their publicity statutes to make it clear that such conduct is prohibited, unless the use is in a biographical portrayal of the person in question as him or herself. *See Cal. Civ. Code § 3344.1(a)(2); 815 Ill. Comp. Stat. Ann. 1075/35(B). §§ 6:33, 6:53, 6:61*.

- **New Hampshire Declines to Recognize False Light Tort.** After dodging the question twice in recent years, the New Hampshire Supreme Court squarely decided that the state would not recognize the tort of false light invasion of privacy. Like many of the dozen or so other states taking this view, it reasoned that the tort was duplicative of defamation. *See Richards v. Union Leader (N.H. Sup. Ct). §§ 5:115, 5:120*.
- **Massachusetts Eases Limitations Bar for Publicity Claims Based on Social Media Posts.** The Massachusetts Supreme Court held that publicity plaintiffs could potentially rely on the "discovery rule" to avoid being barred by the statute of limitations in claims based on the use of their images in social media posts. Whether they elongate the limitations period will be able to depend on the factual context. The court reasoned that comments posted on social media accounts are not always as public as those published in conventional media like newspapers or on generally available websites. Plaintiffs should thus only be time-barred if they knew or "should have known" about the posts in question. *See Davalos v. BayWatch (Mass. Sup. Court) § 11:42*.
- **Several States Adopt Statutes Regulating Use of AI Deepfakes in Political Advertising.** A flurry of new laws have been adopted by several states seeking to control the use of artificial intelligence to generate false political advertising. In such ads, a candidate can convincingly appear to be saying words they never spoke or to be located in a place they never visited. Some of the laws ban the use of AI in political advertising outright, while others require conspicuous disclosure that the ad has been digitally altered. Traditional right of publicity remedies are a poor fit for controlling such behavior because the user

is not typically using the voice or likeness for commercial purposes. *See § 4:30*.

- **Website Privacy Waiver Documents Must Be Read Together as Reasonable Consumer Would Interpret Them.** Online defendants have often faced privacy suits for collecting data from those who visit their sites and for sharing that data with third parties. These defendants often argue that users consented to their practices based on multiple lengthy documents purportedly granting them permission to engage in these activities. Often some of these documents can be contradictory, with some promising privacy while others seeming to waive privacy protections. In a pro-privacy ruling, the Ninth Circuit held that these documents must be read as a group, and given the interpretation that reasonable consumers would use, remarking that it would not attribute to web users the skill of an experienced business lawyer or of someone who is able to easily ferret through a labyrinth of legal jargon to understand what he or she is consenting to. *Calhoun v. Google (9th Cir.)*. *See § 11:65*.
- **Expectation of Privacy in Bank Records Depends on Context.** Under what is known as the "third party" doctrine bank records are not protected from government scrutiny under the Fourth Amendment because they have been turned over to an outsider, namely the bank. For civil privacy tort purposes, however, bank records can retain privacy protection. Whether one retains an expectation of privacy in such records is, however, subject to context, according to the intermediate appellate court in California. Thus, a jury should be allowed to consider the fact that the plaintiff was a senior bank employee whose records were subject to outside audits, and the fact that the defendant who disclosed those records was acting for the purpose of reporting

suspected fraud. *See Garrabrants v. Erhart (Cal. App.). § 5:93*.

- **Negative Information in Military Discharge Documents Can Form Basis for Informational Privacy Claim Against the Government.** When the government shares confidential information about citizens in its possession with third parties, the affected individuals may be able to assert a Constitutional "informational privacy claim." However, when negative information is included in documents that are only shared with the subject of the data, there would normally be no claim because the information has not been disclosed to third parties. A federal court in California held, however, that because military discharge documents must inevitably be shared with others to receive health care, obtain employment, or secure other benefits, veterans whose discharge papers reflected separation from service due to sexual orientation could go forward with an informational privacy claim. *Farrell v. U.S. Dept. of Defense (N.D. Cal.). § 5:58*.

Prof. J. Thomas McCarthy
San Francisco, CA

Prof. Roger E. Schechter
Washington, DC
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