

AUTHORS' INTRODUCTION TO THE 2026 EDITION OF THE RIGHTS OF PUBLICITY AND PRIVACY

This edition contains citations to over 100 new federal and state decisions in the field of publicity and privacy law, many of which are discussed in depth. Some of the key developments covered in this 2026 edition are:

- **New Federal “Take it Down” Act Require Websites to Remove Intimate Images Promptly After Notice.** Under a federal statute adopted in May of 2025, Congress criminalized online publication of “intimate visual depictions.” The statute is principally designed to combat situations where a person seeks to humiliate a former romantic partner by making sexually explicit videos public, a practice often called “revenge porn.” The statute also incorporates a requirement that online platforms establish a notice-and-take-down procedure for dealing with such material. The statute does not, however, provide for a private right of action. *Codified at 47 U.S.C.A. § 223(h). §§ 4:30, 5:82, 8:72.*
- **Three More States Adopt Data Privacy Laws.** New data privacy protection statutes became effective on January 1, 2026, in three states—Kentucky, Indiana, and Rhode Island. This brings the total to 19 states with such statutes, with similar bills pending in several others. § 5:92.
- **Porn Site Sharing of Explicit Video Does not Implicate Right of Publicity.** After the boyfriend of a then 13-year-old girl convinced her to make a sexually explicit video he uploaded it defendant’s pornographic website. Some years

later the young lady, now an adult, brought both common law and statutory publicity claims in California federal court against the site operator. Those claims did not survive a motion to dismiss because plaintiff did not allege that her “identity, name, or likeness was particularly unique or that [defendant] took advantage of the economic value specifically associated with Plaintiff’s identity, name or likeness.” Plaintiff was, however, allowed to proceed on disclosure, false light, and intrusion privacy claims. *Fleitas v. Mindgeek S.A.R.L.* (C.D. Cal.) § 3:4.

- **New York Publicity Statute Covers Digital Replicas of Voice.** Using artificial intelligence, a start-up firm replicated the voices of two “voice actors” and sold subscriptions allowing users to use the voices to recite any words of their choosing. A federal district court in New York held that this violated the New York state right of publicity statute, thus clarifying that the law’s prohibition on the unauthorized use of voice for commercial purposes includes digital replicas of the voice. *See Lehrman v. Lovo* (S.D.N.Y.). § 4:78.
- **Newsworthiness Exception does not Shield Online Sports Betting Sites from Publicity Claims.** A federal court in Pennsylvania rejected the argument of online sports betting operators that its use of the images of major league baseball players was “in the public interest” and thus not a violation of the players’ publicity rights. The court held that the exception in the state statute was only available where the primary purpose of the use was to convey news, which was clearly not the case given that this use was to encourage website visitors to make online bets. *MLB Players, Inc. v. DraftKings, Inc.* (E.D. Pa.). § 6:119.
- **No Reasonable Expectation of Privacy Regarding Purchases of Sex Toys.** A Pennsylvania federal court found that a plaintiff, whose

shopping activity on a site selling adult sex toys was monitored and shared with Google, lacked standing to bring a claim for intrusion because the information gathered was no different from what “store clerks or nosy neighbors browsing the shelves at a brick-and-mortar” sex shop could observe, *DeLong v. PHE, Inc. (E.D. Pa.)*. § 5:92.

- **Ninth Circuit finds *Rogers v. Grimaldi* test remains valid after SCOTUS *Bad Spaniels* Decision.** Under the *Rogers* test, the title of an artistic work is only considered infringing of a trademark if the title either has “no artistic relevance” to the work or, if there is artistic relevance, the title “explicitly misleads as to the source or the content of the work.” When the Supreme Court confronted the question of whether a doggie chew toy called “Bad Spaniels” infringed the trademarks of whiskey maker JACK DANIELS it said “[w]ithout deciding whether *Rogers* has merit in other contexts, we hold that it does not when an alleged infringer uses a trademark . . . as a designation of source for the infringer’s own goods.” Addressing that reserved question, the Ninth Circuit concluded that the *Rogers* test remained viable in the context of a right of publicity claim asserted by a drag performer who was depicted incidentally in an animated Netflix series about a group of LGBTQ spies. It found the use of plaintiff’s image artistically relevant to the show, and therefore dismissed the publicity claim. *Hara v. Netflix (9th Cir.)*. § 8:71.
- **New Jersey Rules False Light Claims are Subject to a One-year Limitations Period.** The New Jersey Supreme Court held, in a case of first impression, that its one-year statute of limitations for defamation claims also applied to suits for false light invasion of privacy because of the close similarity of the two claims. *Chipola v. Flannery (N.J. Sup. Ct.)*. § 11:43.

- **Flood of Web Tracking and Data Breach Cases Continues.** Plaintiffs filed dozens of lawsuits during the past year challenging the use of web tracking software, which allows website operators to record every mouse click and movement on a site, and typically transmits that data to third parties like Facebook, Google and TikTok. These suits often asserted claims for intrusion into seclusion or disclosure of private facts. Plaintiffs also continued to bring a deluge of claims against a wide range of businesses whose less-than-ideal data management protocols allowed third-party hackers to access confidential data, again asserting intrusion or disclosure, along with negligence and breach of contract claims. Where tracked material involved sensitive subjects such as medical information; where the information was linked to plaintiff by name; where the information was shared with third parties; and where the plaintiff was not informed of the tracking, plaintiffs generally were allowed to go forward. Where one or more of those factors was missing, the results of the cases are more mixed. Plaintiffs had even less success using privacy theories in the data breach context. *See generally* §§ 5:115, 5:120.
- **DOGE Cases.** After taking office President Trump charged his new Department of Government Efficiency, or DOGE, to streamline government operations. DOGE personnel at several agencies sought access to various data collections, prompting several labor unions and consumer groups to sue the relevant agencies under the Administrative Procedure Act, the Privacy Act of 1974, and under confidentiality provisions of agency-specific statutes. The government responded by claiming that these various plaintiffs lacked standing. Most of these cases found standing, reasoning that plaintiffs suffered privacy harms analogous to the common law tort of

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intrusion. In at least one instance, however, the Supreme Court intervened via an emergency order to stay an injunction against DOGE, effectively permitting it to access Social Security records, pending review on the merits, without an opinion explaining its reasoning, an order which may render subsequent proceedings moot. *See §§ 11:7.*

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