

Defining New York's Statutory Right of Privacy: A Case Comment on *Messenger v. Gruner + Jahr Printing and Publishing*

Michael C. Hartmere*

INTRODUCTION

Samuel Warren and Louis Brandeis introduced the concept of the common law right of privacy into American law more than a century ago.¹ The authors expressed the need to protect individuals from the undesired exploitation of their personal anonymity in a time when “modern enterprise and innovation have, through invasions upon [an individual’s] privacy, subjected [the individual] to mental pain and distress, far greater than could be inflicted by mere bodily injury”² Decades later, Dean Prosser bolstered the position of the concept of privacy in American law when he opined that the tort protects against four distinct but interrelated invasions of personal privacy:³ “(a) unreasonable intrusion upon seclusion of another . . . ; or (b) appropriation of the other’s name or likeness . . . ; or (c) unreasonable publicity given to the other’s private life . . . ; or (d) publicity that unreasonably places the other in a false light before the public”⁴

* J.D. Candidate, 2001, Fordham University. This Comment is dedicated to my parents and grandmother in gratitude for their love and support. Special thanks to my sister for her encouragement, and to Virginia for her remarkable patience. Thanks to Professor Benjamin Zipursky for his guidance and insight.

1. See Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Warren and Brandeis advocated the creation of a tort designed to preserve “the right to be let alone.” *Id.*

2. *Id.* at 196.

3. See William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960). Prosser’s analysis was adopted in the Second Restatement of Torts. See RESTATEMENT (SECOND) OF TORTS §§ 652A-E (1977).

4. *Id.* § 652A.

In New York, the right of privacy is governed solely by sections 50 and 51 of the New York Civil Rights Law (“the Statute”),⁵ which prohibit the unauthorized use of an individual’s portrait or picture for advertising or trade purposes without his written consent.⁶ New York courts have held, however, that the Statute does not apply to the use of a person’s image in connection with the reporting of newsworthy items.⁷ The Statute prohibits otherwise newsworthy items only when they are advertisements in disguise or when the use of a person’s image bears no real relationship to the story.⁸

In 1999, the Second Circuit was called upon to decide an important issue regarding the scope of the newsworthiness exception

5. New York does not recognize any corresponding common law right of privacy. *See* *Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984).

6. *See* N.Y. Civ. Rights Law §§ 50-51 (McKinney 1998); *Gautier v. Pro-Football*, 107 N.E.2d 485, 487 (N.Y. 1952); *Delan v. CBS, Inc.*, 458 N.Y.S.2d 608, 612 (N.Y. App. Div. 1983). Section 50 of the New York Civil Rights Law provides:

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.

N.Y. Civ. Rights Law § 50. Section 51 of the New York Civil Rights Law provides in pertinent part:

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 as above provided 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 and if the defendant shall have knowingly used such person’s name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages.

Id. § 51.

7. *See Stephano*, 474 N.E.2d at 585.

8. *See id.* (courts have consistently held, from the time of the Statute’s enactment, that these terms should not be construed to apply to publications concerning newsworthy events or matters of public interest); *Murray v. New York Magazine Co.*, 267 N.E.2d 256, 258 (N.Y. 1971) (“The law is settled, however, that ‘A picture illustrating an article on a matter of public interest is not considered used for the purpose or 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.’”) (quoting *Dallesandro v. Henry Holt & Co.*, 166 N.Y.S.2d 805, 806 (1st Dep’t 1957), *app. dismissed*, 162 N.E.2d 726 (N.Y. 1959)).

in *Messenger v. Gruner + Jahr Printing and Publishing*.⁹ Several New York courts had held, prior to *Messenger*, that there was a “substantial fictionalization” limitation on the newsworthiness doctrine.¹⁰ In recent years, however, the Court of Appeals indicated that only the “real relationship” and “advertisement in disguise” limitations apply.¹¹ In light of this seemingly conflicting precedent,¹² the Second Circuit certified the disputed question *sua sponte* to the New York Court of Appeals: “May a plaintiff recover under [the Statute] where the defendant used the plaintiff’s likeness in a substantially fictionalized way without the plaintiff’s consent, even if the defendant’s use of the image was in conjunction with a newsworthy column?”¹³ The New York Court of Appeals answered in the negative,¹⁴ holding that the only limitations on the newsworthiness exception are that a real relationship between the article and the photograph must exist and that the article cannot be an advertisement in disguise.¹⁵

The right of privacy¹⁶ in New York has thus been significantly

9. 175 F.3d 262 (2d Cir. 1999). The case was commenced in federal court as a diversity action. *Messenger* resided in Florida and *Gruner + Jahr* was a New York resident. *See Messenger v. Gruner + Jahr USA Printing and Publ’g*, 994 F. Supp. 525, 526 (S.D.N.Y. 1998).

10. *See, e.g., Spahn v. Julian Messner, Inc.*, 221 N.E.2d 543, *vacated*, 387 U.S. 239, *adhered to on remand*, 233 N.E.2d 840 (1967) (a substantially fictionalized use of an individual’s name or likeness may be actionable under the Statute).

11. *See, e.g., Finger v. Omni Publications, Int’l*, 566 N.E.2d 141 (N.Y. 1990) (focusing only on real relationship and advertisements in disguise).

12. The apparently unresolved issue boiled down to “whether a plaintiff can recover under New York’s statutory right of privacy when a publisher uses the plaintiff’s image in a substantially fictionalized way to illustrate a newsworthy piece.” *Messenger*, 175 F.3d at 264.

13. *Id.* at 266. A second question was also certified: “If so, are there any additional limitations on such a cause of action that might preclude the instant case?” This question was never reached by the Court of Appeals. *Id.*

14. *See Messenger v. Gruner + Jahr Printing and Publ’g*, No. 1705, 2000 WL 190553, at *2 (S.D.N.Y. Feb. 17, 2000).

15. *See id.* at *3-*4.

16. Some commentators have implied that the *Messenger* case involves primarily the issue of the right of publicity in New York. *See, Federal Appellate Court Asks New York Court of Appeals to Clarify State’s Right of Publicity Statute in Connection with “YM” Magazine’s Appeal from \$100,000 Judgment Won by Teen Model Whose Photos Were Used to Illustrate Sex Advice Column*, 21 ENT. L. REP. 20 (October, 1999); Bruce P. Keller & Craig Bloom, *The Right of Publicity Versus the First Amendment*, 17 COMM. LAW 3 (1999). While the same elements violate both the right of publicity and the right

clarified by the state's highest court. What has been called the "substantial fictionalization" limitation has been put to rest in cases involving the use of a person's portrait or picture in connection with a newsworthy article. This case comment considers the ramifications of the Court of Appeals' recent decision in *Messenger*. Part I examines the legal background of the substantial fictionalization controversy in New York and the precedent underlying the Court of Appeals decision. Part II discusses the facts and procedural history of the *Messenger* case. Part III analyzes the probable effects of the decision. Specifically, Part III endorses the *Messenger* opinion as an imperfect, but necessary and beneficial elucidation of the Statute.

I. THE SUBSTANTIAL FICTIONALIZATION DEBATE

A. *The Statute*

The Statute was enacted in New York in direct response to the Court of Appeals decision in *Roberson v. Rochester Folding Box Co.*¹⁷ In *Roberson*, a milling company used a likeness of the plaintiff without her consent in an advertisement for flour.¹⁸ A closely divided court acknowledged the introduction of the concept of a right of privacy into American legal theory¹⁹ before determining that no common law precedent existed for the enforcement of such a right in New York.²⁰ The legislature, rather than the courts, exclusively possessed the power to create a judicially cognizable right of privacy.²¹ The legislature answered by passing the Statute

of privacy under the Statute, *see, e.g.*, *Brinkley v. Casablanca*, 80 A.D.2d 428, 438 N.Y.S.2d 1004, 1012 (N.Y. App. Div. 1981), the right of publicity specifically protects the financial value of a celebrity's public identity against commercial exploitation without his consent. *See Allen v. National Video, Inc.*, 610 F. Supp. 612, 621 (S.D.N.Y. 1985). This author believes that because Jamie Messenger is not a celebrity, her suit hinges on a right of privacy theory rather than the right of publicity.

17. 64 N.E. 442 (N.Y. 1902).

18. *See id.*

19. *See generally* Warren & Brandeis, *supra* note 1 (advocating the introduction of this concept into American legal theory).

20. *See Roberson*, 64 N.E. at 443.

21. *See id.* In fact, the majority seemed to invite such a change in the law:

The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the

the following year.²²

1. Purpose

The legislature enacted the Statute to redress injuries to private citizens who are exploited in circumstances similar to those at issue in the *Roberson* case.²³ The courts, however, have been clearly mindful also of the significant constitutional and social policy issues involved in many privacy cases.²⁴ While the Statute is intended to protect individuals from the undesired commercial use of their likenesses, New York courts have consistently deferred to the paramount concerns of ensuring free speech and free press.²⁵ Because the First Amendment guards many of the rights considered essential to our democratic society, the public is best served by laws that encourage the unfettered distribution of news and other information.²⁶ Thus, New York courts have collectively determined that in terms of public policy, the interest in protecting free speech and free press often exceeds the interest in shielding individuals from invasions of their privacy.²⁷ “The press may, at

name of another for advertising purposes without his consent. In such event no embarrassment would result to the general body of the law, for the rule would be applicable only to cases provided for by the statute.

Id.

22. See L.1903, ch.132. New York was the first state to adopt a statutory right of privacy. See *Howell v. New York Post*, 612 N.E.2d 699, 703 (N.Y. 1993).

23. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 381 (1967) (“The text of the statute appears to proscribe only conduct of the kind involved in *Roberson*, that is, the appropriation and use in advertising or to promote the sale goods, of another’s name, portrait or picture without his consent.”).

24. See, e.g., *Spahn v. Julian Messner, Inc.*, 233 N.E.2d 840 (1967) (describing judicial policy of interpreting the Statute in a manner that fully protects free speech).

25. See *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 88 (2d Cir. 1989) (“In applying [the Statute], a court must be ever mindful of the inherent tension between the protection of an individual’s right to control the use of his likeness and the constitutional guarantee of free dissemination of ideas, images, and newsworthy matter in whatever form it takes.”); *Quezada v. Daily News*, 501 N.Y.S.2d 971, 975 (N.Y. App. Term 1986) (courts have accorded “due deference to constitutional concerns.”).

26. See *Goelet v. Confidential, Inc.*, 171 N.Y.S.2d 223, 225 (N.Y. App. Div. 1958) (describing a free press as “intimately bound up with fundamental democratic institutions”) (*quoting* *Lahiri v. Daily Mirror*, 295 N.Y.S. 382, 388 (N.Y. App. Div. 1937)); *Goldberg v. Ideal Publ’g*, 210 N.Y.S.2d 928, 929 (N.Y. Sup. Ct. 1960).

27. See *Namath v. Sports Illustrated*, 363 N.Y.S.2d 276, 280 (N.Y. Sup. Ct.), *aff’d*, 371 N.Y.S.2d 10 (N.Y. App. Div. 1975), *aff’d mem.*, 352 N.E.2d 584 (N.Y. 1976); *Rand*

times, be trivial, and even obnoxious, but this must be tolerated because of the important part it plays in protecting our liberty.”²⁸

2. Interpretation

While the Statute itself does not define the terms it contains, New York courts have liberally construed these terms over the course of the last century.²⁹ These expansive interpretations are indicative of the lengths to which New York courts will go in order to protect the right of privacy. Decisions concerning the issue of what constitutes a “portrait or picture” provide excellent examples of this policy of broad interpretation.³⁰ Indeed, “portrait or picture” is not limited to photographs, “but generally comprises those representations which are recognizable as likenesses of the complaining individual.”³¹ Thus, if the plaintiff is recognizable in an advertisement, his face need not even be shown in order to recover under the Statute.³² In fact, the term “portrait or picture” has consistently been so expansively defined that it includes any representation of a plaintiff, whether two- or three-dimensional, including mannequins and sculptures that reflect the plaintiff’s features.³³ Courts have also liberally defined other terms of the Statute.³⁴

Though the Statute is broadly construed in order to protect private citizens, there are clear limits on its reach, and the protection of individual privacy is far from absolute. For example, “a use for the purposes of trade” is defined as a use for the purpose of making a profit.³⁵ A literal interpretation of the term “a use for the pur-

v. Hearst Corp., 298 N.Y.S.2d 405 (N.Y. App. Div. 1969).

28. *Ann-Margaret v. High Society Magazine, Inc.*, 498 F. Supp. 401, 406 n.12 (S.D.N.Y. 1980).

29. *See Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580, 583-84 (N.Y. 1984).

30. *See id.*

31. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 726 (S.D.N.Y. 1978).

32. *See Cohen v. Herbal Concepts, Inc.*, 472 N.E.2d 307, 310 (N.Y. 1984).

33. *See Young v. Greneker Studios, Inc.*, 26 N.Y.S.2d 357, 358 (N.Y. Sup. Ct. 1941).

34. A use for advertising purposes “requires a use in, or as part of, an advertisement or solicitation for patronage.” *Delan*, 458 N.Y.S.2d 608, 613 (N.Y. App. Div. 1983). *See also Thompson v. Close-Up, Inc.*, 98 N.Y.S.2d 300, 301 (N.Y. App. Div. 1950).

35. *See id.* When magazines market the photographs of private individuals as posters, courts have found a use for the purposes of trade. *See Titan Sports, Inc. v. Comics*

poses of trade” would encompass any unauthorized use of an individual’s image by organizations like the New York Times and CBS News, as well as less-respected media outlets, because they are all for-profit ventures.³⁶ Facially, then, the Statute would prohibit the use of an individual’s likeness in virtually all media. Due to the necessity of protecting the media’s First Amendment rights, however, the courts have refused to adopt a literal construction of this term when an individual’s portrait or picture is used to illustrate a newsworthy article.³⁷ Thus, in determining whether an article is newsworthy, the courts consider only the content of the column, rather than the organization’s motive to increase subscriptions.³⁸

In New York, the considerable judicial concern for ensuring that the media are unobstructed in reporting the news is reflected in consistently expansive interpretations of the newsworthiness exception. The courts have defined the newsworthiness exception to include virtually all items that are designed to be informative.³⁹ The exception has been applied not only to stories describing political and social trends, “but also to news stories and articles of consumer interest including developments in the fashion world.”⁴⁰

World Corp., 870 F.2d 85, 88; *Brinkley v. Casablanca*, 438 N.Y.S.2d 1004, 1008. *But see Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501 (N.Y. Sup. Ct. 1968) (use of image of mock presidential candidate in a poster is not for purposes of trade).

36. “[W]ith respect to their ability to serve as fora for debates concerning matters of public interest, television talk shows are the equals of The New York Times in the eyes of the law.” *Weber v. Multimedia Entertainment, Inc.*, 1998 WL 2550 at *4 (S.D.N.Y. 1998) (citing *Huggins v. Povich*, 1996 WL 515498 (N.Y. Sup. Ct. 1996)).

37. *See Delan*, 458 N.Y.S.2d at 613.

38. *See Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580, 585 (N.Y. 1984); *Arrington v. New York Times Co.*, 434 N.E.2d 1319, 1322 (N.Y. 1982).

39. *See Delan*, 458 N.Y.S.2d at 613.

40. *Stephano*, 474 N.E.2d at 585. The broad range of subject matter considered newsworthy in the past was outlined by the Court of Appeals in *Messenger*. *See* 2000 WL 190553 at *2-*3. Other examples of newsworthy topics are found in *Time, Inc. v. Hill*, 385 U.S. 374, 388 (opening of a new play); *Titan Sports, Inc.*, 870 F.2d at 88 (professional wrestling); *Psihoyos v. National Examiner*, 1998 WL 336655 at *7 (S.D.N.Y. 1998) (art cars); *Weber*, 1998 WL 2550 at *3 (teenage runaways and teen prostitution); *Pagan v. New York Herald Tribune, Inc.*, 258 N.E.2d 727, 728 (N.Y. 1970) (popular styles of bathing suits and other fashion news); *Davis v. High Society Magazine, Inc.*, 457 N.Y.S.2d 308, 315 (N.Y. App. Div. 1982) (photographs of nude well-known female boxer); *Goelt v. Confidential Inc.*, 171 N.Y.S.2d 223, 227 (N.Y. App. Div. 1958) (lurid escapades of famous married couple).

Despite its breadth, even the newsworthiness exception is not without limits. Under New York law, the newsworthiness exception does not apply to a use that has “no real relationship to the article” or to a use in an article that is “an advertisement in disguise.”⁴¹ In addition to these two limitations, for many years some courts held that there was a third: substantial fictionalization.⁴² In recent cases, however, the Court of Appeals has implied that New York law no longer recognizes the substantial fictionalization limitation on newsworthiness.⁴³ In *Messenger*, the courts were called upon to determine whether this potential third exception still exists under New York law.⁴⁴

B. *The Creation of the Substantial Fictionalization Exception*

Messenger relied primarily on *Spahn*⁴⁵ and *Binns v. Vitagraph Co. of America*⁴⁶ to support her contention that she was entitled to recover damages under the Statute for Gruner + Jahr’s use of her photographs in the “Love Crisis” column.⁴⁷ In its decision, the Court of Appeals reviewed these cases in some detail.⁴⁸

The New York Court of Appeals addressed the issue of substantial fictionalization in the 1913 case of *Binns v. Vitagraph Co. of America*.⁴⁹ In 1909, John Binns used wireless telegraphy following the collision of two steamships at sea to save the lives of hundreds of passengers. A short time later, Vitagraph produced a film depicting the events. Vitagraph employed actors to portray

41. *Stephano*, 474 N.E.2d at 585 (quoting *Murray v. New York Magazine Co.*, 267 N.E.2d 256, 258 (N.Y. 1971)).

42. *See, e.g.*, *Spahn v. Julian Messner, Inc.*, 233 N.E.2d 840 (1967 case holding that the substantially fictionalized use of an individual’s name or likeness may be actionable under the Statute).

43. *See, e.g.*, *Finger v. Omni Publications, Int’l*, 566 N.E.2d 141 (1990 case focusing only on real relationship and advertisements in disguise). *But see* *Fils-Aime v. Enlightenment Press, Inc.*, 507 N.Y.S.2d 947, 949 (N.Y. App. Term 1986) (juxtaposition of photograph and article clearly false and misleading).

44. *See supra*, notes 9-13 and accompanying text.

45. 233 N.E.2d 840.

46. 103 N.E. 1108 (N.Y. 1913).

47. *See* *Messenger v. Gruner + Jahr Printing and Publ’g*, No. 1705, 2000 WL 190553, at *4 (S.D.N.Y. Feb. 17, 2000).

48. *See id.*

49. 103 N.E.2d 1108.

Binns and others involved in the story, and created props and scenery in its studio to replicate most of the settings of the events. The producers conceded that they also took some creative liberties in re-creating the story when they lacked factual information.⁵⁰ Thus, while the movie was based on actual events, the court characterized it as “mainly a product of the imagination.”⁵¹ Moreover, the film “was not designed to instruct or educate,” but rather to “amuse” its viewers.⁵² The court therefore held that Vitagraph had used Binns’ name and likeness for the purposes of trade.⁵³

Substantially false descriptions of actual events continued to provide a cause of action under the Statute in the following years. In *Sutton v. Hearst Corp.*,⁵⁴ a turret gunner who died in World War II bequeathed a single rose a week to be delivered to a married woman he had known only casually before the war. Though the bequest had actually occurred, the Hearst Corporation published an article that falsely depicted the secret admirer as Mrs. Sutton’s former lover.⁵⁵ The First Department held that the alleged fictionalization provided valid grounds for recovery under the Statute.⁵⁶

The Court of Appeals faced another instance of a fictionalized work in *Spahn v. Julian Messner, Inc.*⁵⁷ Warren Spahn, a re-

50. *See id.*

51. *Id.* at 56. In other instances, however:

It would not be within the evil sought to be remedied by [the Statute] to construe it so as to prohibit the use of the name, portrait, or picture of a living person in truthfully recounting or portraying an actual current event as is commonly done in a single issue of a regular newspaper.

Id.

52. *Id.* at 58. This decision foreshadowed many others to follow in New York in its zealous protection of privacy. Failing to redress the injuries in this case, the court stated, would be to open the door for other film producers to exploit the portrait or picture of an individual “for the purpose of showing his peculiarities as of dress and walk, and his personal fads, eccentricities, amusements, and *even his private life.*” *Id.* (emphasis added).

53. *See id.*

54. 98 N.Y.S.2d 233 (N.Y. App. Div. 1950).

55. *See id.* at 234.

56. *See id.* at 235. Significantly, however, the dissent stated that while the Statute incorporates the principle of privacy, it “is not as broad in its embrace as the champions of privacy or pioneers in that field would make it.” *Id.* at 239 (Peck, J., dissenting) (citing Warren & Brandeis, *supra*, note 1).

57. 233 N.E.2d 840 (N.Y. 1967).

nowned professional baseball player,⁵⁸ was the subject of a biographical children's book published by the defendant. In researching and writing the story, the author created imaginary dialogue and incidents in Spahn's life, including fictitious accounts of Spahn's courtship of his wife and his military achievements.⁵⁹ In preparing to write the book, the author admittedly failed to interview Spahn, any of Spahn's relatives and any baseball player who had known him personally.⁶⁰ The court found that the author's research consisted primarily of merely reviewing newspaper and magazine articles about the player.⁶¹ Rather than attempting to demonstrate that the author had employed good faith research methods, the defense elected to argue that printing knowingly false statements in children's books was justified because it was a standard practice in the publishing industry.⁶² The Court of Appeals rejected the argument, holding that "the presentation [was] infected with material and substantial falsification and that the work was published with knowledge of such falsification or with a reckless disregard for the truth," and was thus actionable under the Statute.⁶³

In other instances, substantial fictionalization has been held up as a common sense limitation on newsworthiness. Uses for the "purposes of trade" include those infected with fiction,⁶⁴ according to this theory, because substantially false items have no value as news and thus are not shielded by the same constitutional safeguards as are topics of legitimate public interest.⁶⁵ Furthermore,

58. Because Spahn was a public figure, the court was required to conform its decision in this case to the "actual malice" standard set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See 233 N.E.2d at 842.

59. These facts were found by the trial court, see 250 N.Y.S.2d 529, 541 (N.Y. Sup. Ct. 1964), and affirmed by the Appellate Division. See 260 N.Y.S.2d 451, 454 (N.Y. App. Div. 1965).

60. See *Spahn*, 233 N.E.2d at 842-43.

61. See *id.* at 843.

62. See *id.* at 842-43.

63. *Id.* at 842. Thus, the court concluded that the *New York Times* actual malice standard had clearly been met. See *id.*

64. See *id.*

65. See *Davis v. High Society Magazine, Inc.*, 457 N.Y.S.2d 308, 314-15 (N.Y. App. Div. 1982). Publications that are transparently fictional and are not intended to deceive the public, however, may nonetheless have literary merit, as is the case in satire and caricature. See *id.*

the adoption of the substantial fictionalization exception ensures that individuals are protected against the same commercial exploitation the Statute sought to prohibit at the time of its enactment.⁶⁶ Thus, some courts have reasoned that an intuitive fairness inheres in permitting a private person to recover under the Statute on those occasions when a medium has maliciously portrayed the person in a way it knew to be untrue.⁶⁷

Drawing upon these theories to varying degrees, substantial fictionalization has been acknowledged by some courts in cases where the exception has not applied.⁶⁸ For example, in *Gautier*,⁶⁹ a well-known animal trainer performed his act during the halftime show of a professional football game pursuant to a contract with the owners of the Washington Redskins. Although the contract provided that Plaintiff's act was not to be televised without his consent, ABC television stations broadcast the performance following a brief commercial announcement at the conclusion of the first half.⁷⁰ Other performers followed Gautier's act before ABC aired another commercial break and the start of the second half.⁷¹ The court held that the broadcast of Plaintiff's picture in a commercially sponsored program did not constitute a use for advertising purposes because there was no connection between his performance and any advertisement.⁷² Further, the use was not for trade purposes because plaintiff had voluntarily attracted attention to himself, and the broadcast merely reported a newsworthy event.⁷³ Notably, the court stated that the potential breach of

66. *See id.* at 314. "This interpretation of [the Statute] gives redress to the victims of some of the more devastating, but often subtle, techniques of commercial exploitation of a person's identity." *Id.*

67. *See generally* Weber v. Multimedia Entertainment, Inc., 1998 WL 2550 at *3 (S.D.N.Y. 1998).

68. *See* Pagan v. New York Herald Tribune, Inc., 301 N.Y.S.2d 120, 124 (N.Y. App. Div. 1969), *aff'd*, 258 N.E.2d 727 (N.Y. 1970); Goelet v. Confidential, Inc., 171 N.Y.S.2d 223, 226-27 (N.Y. App. Div. 1958); Quezada v. Daily News, 501 N.Y.S.2d 971, 975 (N.Y. App. Term 1986).

69. *Gautier v. Pro-Football*, 107 N.E.2d 485 (N.Y. 1952).

70. *See id.* at 487.

71. *See id.*

72. *See id.* at 488.

73. *See id.* Here the performance itself was the newsworthy event, and the performer's picture was used in conjunction with the event. The court acknowledged the substantial fictionalization limitation as set forth in *Binns v. Vitagraph Co.*, 103 N.E.

plaintiff's contract did not, of itself, create a cause of action under the Statute.⁷⁴

C. *Judicial Hegira: The Ebb of Substantial Fictionalization*

The discussion in *Gautier* regarding the use of pictures in connection with newsworthy matters⁷⁵ suggests that the courts, while still acknowledging the existence of a substantial fictionalization limitation in select circumstances,⁷⁶ were concerned primarily with the real relationship and the advertisement in disguise limitations. In the ensuing years, courts gradually moved farther away from the fictionalization analysis in the context of the use of pictures to illustrate newsworthy events.⁷⁷ In *Messenger*, the Court of Appeals examined the precedent set in cases involving substantially similar facts.⁷⁸ Ultimately, the *Messenger* decision made clear that the substantial fictionalization limitation is inapplicable in analyzing the use of a person's image in conjunction with a newsworthy article, even where the use creates a false impression about him.⁷⁹

The Court of Appeals previously indicated that only two limitations exist on the newsworthiness exception in *Murray v. New York Magazine Co.*⁸⁰ While standing in a crowd watching New York City's St. Patrick's Day parade in 1967, Mr. Murray was photographed without his consent by a freelance photographer who

1108 (N.Y. 1913) and *Sutton v. Hearst Co.*, 98 N.Y.S.2d 233 (N.Y. App. Div. 1950), but distinguished those cases because in the case before it there was no commercialization of plaintiff's personality separate from the dissemination of information in the broadcast of plaintiff's act. See *Gautier*, 107 N.E.2d at 488.

74. See *id.* at 489. This element of the opinion of the court is significant because of the parallels between the facts involved in this case and those in *Messenger*. Though Gruner + Jahr failed to adhere to the terms of its agreement with *Messenger*, its use of her photographs was not actionable *under the Statute* because the photographs were used to illustrate a newsworthy column. See 2000 WL 190553 at *4.

75. See *infra* notes 110-14 and accompanying text.

76. These circumstances appear to have been limited to the falsification of biographical events in the lives of celebrities and limited purpose public figures, as in *Binns* and *Spahn*. See discussion *supra*, Part IB.

77. See, e.g., *Arrington v. New York Times Co.*, 434 N.E.2d 1319 (N.Y. 1982).

78. See *Finger v. Omni Publications, Int'l*, 566 N.E.2d 840 (N.Y. 1990), *Arrington*, 434 N.E.2d 1319, and *Murray v. New York Magazine Co.*, 27 N.Y.2d 406 (N.Y. 1971). See 2000 WL 190553 at *3.

79. See *id.* at *2.

80. See 267 N.E.2d 256 (N.Y. 1971).

later sold his picture to New York Magazine.⁸¹ Though not of Irish heritage, Murray was clad in traditional Irish garb- a green bow tie, green pin and “Irish” hat- at the time the picture was taken.⁸² Two years later, the photograph appeared on the cover of New York Magazine above the headline “The Last of the Irish Immigrants, by Jimmy Breslin.” The feature article did not refer to the photograph, nor did it identify Murray by name.⁸³

Making no mention of the substantial fictionalization limitation, the Court of Appeals held that the photograph was used to illustrate a matter of interest to many readers.⁸⁴ The court’s analysis of the statutory claim focused solely on whether either of the two limitations on the newsworthiness exception applied; that is, whether the article was an advertisement in disguise or whether the use of Murray’s photograph bore no real relationship to the article.⁸⁵ The court concluded that the Plaintiff’s style of dress and attendance at the parade, as depicted in the photograph, were reasonably related to the article concerning Irish immigrants in New York, and was not an advertisement in disguise.⁸⁶ The magazine’s use of Murray’s photograph on its cover was therefore not actionable under the Statute.⁸⁷

Another false impression complaint stemming from the unauthorized use of a person’s photograph in a magazine arose in *Arrington*, where the New York Court of Appeals again refused to acknowledge substantial fictionalization.⁸⁸ In *Arrington*, the New York Times Magazine published a picture of a young African-American male walking along a Manhattan street to illustrate a story about “the role of the expanding black middle/professional

81. *See id.* at 257.

82. *See id.*

83. *See id.*

84. *See id.* at 258.

85. *See id.* (“A picture illustrating an article on a matter of public interest is not considered used for the purpose or 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.”) (quoting *Dallesandro v. Henry Holt & Co.*, 166 N.Y.S.2d 805, 806 (N.Y. App. Div. 1957), *app. dismissed*, 162 N.E.2d 726 (N.Y. 1959)).

86. *See id.*

87. *See id.*

88. *See Arrington v. New York Times Co.*, 434 N.E.2d 1319 (N.Y. 1982).

class in today's society."⁸⁹ Arrington, a financial analyst, deemed the article controversial and supportive of views he did not espouse. He complained that the use of his photograph⁹⁰ made him the target of public ridicule because others were led to incorrectly believe that Arrington either endorsed the viewpoint set forth in the article, or that he had undertaken a career as a professional model.⁹¹

In deciding the case, the court emphasized that the Statute was enacted specifically to redress injuries that occur in cases like *Roberson*.⁹² The court determined that the legislature sought to protect the right of privacy solely in these contexts.⁹³ This intent is carried out judicially through the broad application of the newsworthiness exception, an exception that is limited in only two situations.⁹⁴ Thus, the issue in the case was reduced to whether the article was an advertisement in disguise or whether Arrington's photograph bore no real relationship to an article concerning the burgeoning black middle class. Arrington conceded that his photograph depicted him in a way that the public would associate with the middle class.⁹⁵ He argued, however, that he had no connection with a class of people that the article portrayed as materialistic and amoral.⁹⁶ The Court of Appeals was unimpressed by Arrington's contention, stating, "[t]he asserted lack of a 'real relationship' boils down then, to his conviction that his views are not consonant with those of the author."⁹⁷ The court rejected this as viable grounds for relief⁹⁸ and ruled that the complaint against the New York

89. *Id.* at 1320. The article concluded that "this group has been growing more removed from its less fortunate brethren." *Id.*

90. Unlike Jamie Messenger, Arrington was unaware, prior to the publication of the article, that his picture had been taken, let alone that it would be published to illustrate a magazine article. *See id.*

91. *See id.*

92. *See id.* at 1321 ("The statutory scheme was enacted as a direct response to *Roberson v. Rochester Folding Box Co.*"). *Id.*

93. *See id.* "In no other respect did it undertake to roll back the court-pronounced refusal to countenance an action for invasion of privacy." *Id.*

94. *See id.* at 1322.

95. *See id.*

96. *See id.*

97. *Id.*

98. *See id.* at 1322-23.

Times should be dismissed.⁹⁹

Perhaps the most factually similar circumstances to those at issue in *Messenger* are found in *Finger v. Omni Publications International*,¹⁰⁰ a case decided by the Court of Appeals in 1990. In June 1988, Omni magazine published an article entitled “Caffeine and Fast Sperm.”¹⁰¹ According to the Omni report, scientific research indicated that exposing sperm to high concentrations of caffeine could increase *in vitro* fertilization rates.¹⁰² The publishers of the magazine illustrated the article with a picture of Mr. and Mrs. Finger and their six children above the caption “Want a big family? Maybe your sperm needs a cup of Java in the morning. Tests reveal that caffeine-spritzed sperm swim faster, which may increase the chances for *in vitro* fertilization.”¹⁰³ The Plaintiffs were never identified by name, and the story did not state that the children in the photograph were conceived through *in vitro* fertilization or that the parents had taken part in the study.¹⁰⁴ Nevertheless, the Fingers argued that no real relationship existed between the picture of their family and the article.¹⁰⁵ They sought to distinguish their case from *Arrington*¹⁰⁶ and *Murray*.¹⁰⁷ The court, however, was not persuaded and held that the fertility theme was reasonably related to both the image of the Finger family and the caption appearing beneath their picture.¹⁰⁸ The court explicitly held that under New York law, the newsworthiness exception is restricted only in the two traditional ways.¹⁰⁹

99. *See id.* at 1324.

100. 566 N.E.2d 141 (N.Y. 1990).

101. *See id.* at 142.

102. *See id.*

103. *Id.* at 142-43.

104. *See id.* at 143.

105. *See id.* at 144.

106. *See Arrington v. New York Times Co.*, 434 N.E.2d 1319 (N.Y. 1982). Plaintiffs contended that in *Arrington* there were “external and objective” criteria linking the photograph to the article which were not present in this case. *See id.* at 144.

107. *See id.* The Fingers contrasted their lack of involvement in the fertility study with the circumstances involved in *Murray*, where the plaintiff had voluntarily participated in a public spectacle. *See Murray v. New York Magazine Co.*, 267 N.E.2d 256, 257 (N.Y. 1971).

108. *See* 561 N.E.2d at 144-45.

109. “[J]udicial 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 ‘adver-

The Court of Appeals decision in *Messenger* is far from surprising when considered in light of the precedent provided by the *Murray*, *Arrington* and *Finger* cases.¹¹⁰ For decades, the courts in New York had been moving away from supporting the substantial fictionalization limitation in cases involving the use of pictures to illustrate newsworthy items. *Messenger* thus marked the end of a virtual judicial journey away from the controversial substantial fictionalization analysis.

II. *MESSENGER V. GRUNER + JAHR PRINTING AND PUBLISHING*

A. *Background*

Gruner + Jahr publishes YM (Young and Modern), a magazine targeting an audience of teenage girls, which features articles on beauty, relationships and popular trends.¹¹¹ “Love Crisis,” a column that regularly appeared in YM throughout 1994 and 1995, provided a forum for girls dealing with romantic issues to address their questions and stories to YM in the form of letters to the editor.¹¹² In the June/July 1995 issue, the headline for the “Love Crisis” column proclaimed “I got trashed and had sex with three guys.”¹¹³ The accompanying letter describing the events alluded to in the headline was composed by someone identified only as “Mortified.”¹¹⁴ Mortified lamented about her feelings of confusion and embarrassment in the wake of her tryst with her boyfriend and his two friends.¹¹⁵ Mortified indicated that she had been subjected to ostracism and ridicule amongst her peers in the days and weeks following the encounter.¹¹⁶ Photographs of Jamie Messenger, a fourteen year-old model,¹¹⁷ surrounded Mortified’s letter and the

tisement in disguise.” *Id.* (quoting *Murray*, 267 N.E.2d at 258).

110. See 2000 WL 190553 at *2.

111. See *Magazines*, (last modified Feb. 11, 2000) <http://www.guj.de/english/products/magazines/3ym_eng.html>.

112. See 175 F.3d at 262-63.

113. See *id.* at 263.

114. See *id.*

115. See *Messenger*, 994 F. Supp. at 526.

116. See *id.*

117. While Messenger posed for the pictures that were used in the YM column and was “booked” by a modeling agency, proper consent was never obtained from her par-

editor's advice in reply.¹¹⁸ The photographs depicted Messenger in "various stages of undress and in poses suggestive of events related in the purported letter."¹¹⁹

Messenger felt that the juxtaposition of her pictures with the letter falsely implied to readers that she had engaged in the affair and was the author of the letter.¹²⁰ Furthermore, she accused Gruner + Jahr of deceiving her about the future publication of the pictures at the time she posed for them.¹²¹ Finally, Messenger alleged that no reader composed the "Mortified" letter; rather, it was a fictional work created by YM's editors.¹²² Messenger sued Gruner + Jahr, asserting claims of libel, negligent and intentional infliction of emotional distress, negligence, and violation of privacy under the Statute.¹²³

B. *Procedural History*

District Judge Lewis A. Kaplan dismissed Messenger's non-privacy causes of action under Florida law.¹²⁴ Judge Kaplan determined that with respect to these causes of action, the state of Florida had the most significant relationship to the dispute, and therefore applied the law of that state.¹²⁵ Under Florida law, a single act of tortious conduct gives rise to only one cause of action.¹²⁶ In this instance, the primary theory of recovery was defamation.¹²⁷ Messenger was required under a Florida defamation statute to give notice to Gruner + Jahr of her intention to file suit,¹²⁸ a condition

ents. *See* 175 F.3d at 263.

118. The advice columnist concluded that Mortified had made a "major mistake," and recommended that she be tested for sexually transmitted disease and pregnancy. *See id.*

119. 994 F. Supp. at 526.

120. *See id.*

121. *See id.* at 526-27.

122. *See id.*

123. *See id.* at 527.

124. *See* Messenger v. Gruner + Jahr Printing and Publ'g, No. 97 Civ. 0136 (LAK) (S.D.N.Y. Jan. 21, 1998) (decision dismissing libel, negligent and intentional infliction of emotional distress and negligence claims).

125. *See id.* at 52-53.

126. *See id.* at 60.

127. *See id.*

128. *See* FLA. STAT. ch. 770.01 (1996).

Messenger failed to meet.¹²⁹ Thus, because her libel claim failed under the Florida statute, the court was forced to dismiss Messenger's three other non-privacy claims.¹³⁰

Judge Kaplan began his consideration of Messenger's privacy claim by examining the history and purpose of the Statute.¹³¹ The court held that the "Love Crisis" column was newsworthy, and deemed the photographs of Messenger reasonably related to the topics discussed in the letter and the editor's comments in reply.¹³² The court noted, however, that some past cases had protected the "interests of persons victimized by falsehood."¹³³ According to the court, readers of the column arguably could conclude that Messenger was the author of the featured letter.¹³⁴ Despite the defense argument that "the claim nevertheless should be dismissed because New York has abandoned the fictionalization limitation on the newsworthiness privilege,"¹³⁵ Judge Kaplan was not persuaded, and held that the cases recognizing fictionalization as an additional limitation on the newsworthiness exception were still good law.¹³⁶ The newsworthiness exception will not apply, according to the court, in cases where the disputed use "is 'infected with material and substantial falsity'"¹³⁷ Thus, the court denied the defendant's summary judgment motion.¹³⁸ Following a trial on the mer-

129. See *Messenger*, No. 97 Civ. 0136 (LAK) (S.D.N.Y. Jan. 21, 1998) at 52.

130. See *id.* at 60.

131. See 994 F. Supp. at 527.

132. See *id.* at 528 ("[T]his Court holds that the subject of the column was a matter of public interest and that the use of the photographs was reasonably related to it.").

133. See *id.* at 527-528. The court cited *Spahn v. Julian Messner, Inc.*, 233 N.E.2d 840 (N.Y. 1967) and *Fils-Aime v. Enlightenment Press, Inc.*, 507 N.Y.S.2d 947 (App. Term 1986).

134. See 994 F. Supp. at 529.

135. *Id.* The defense relied principally on *Finger v. Omni Publications, Int'l*, 566 N.E.2d 141 (N.Y. 1990), and *Arrington v. New York Times Co.*, 434 N.E.2d 1319 (1982), *cert. denied*, 459 U.S. 1146 (1983).

136. See 994 F. Supp. at 530.

137. *Id.* at 529 (quoting *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 132-33 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985)).

138. 994 F. Supp. at 530. The defense nevertheless requested that Judge Kaplan certify his denial of summary judgment for interlocutory appeal to the Court of Appeals. The court denied the request. See letter from Robert G. Sugarman, Attorney for Defendant, to Honorable Lewis A. Kaplan, United States District Judge 1 (Feb. 25, 1998) (on file with the United States District Court for the Southern District of New York).

its of the statutory claim, a jury awarded Messenger \$100,000 in compensatory damages.¹³⁹

In 1999, Gruner + Jahr appealed, and Messenger cross-appealed the case to the Second Circuit.¹⁴⁰ Like the District Court,¹⁴¹ Judge McLaughlin began the Second Circuit opinion by reviewing the history of the Statute and the traditional limitations on the newsworthiness exception.¹⁴² This court, however, observed that several recent New York Court of Appeals cases indicated, by glaringly omitting any discussion or consideration of the issue, that the substantial fictionalization limitation no longer applies under the circumstances surrounding Messenger's claim.¹⁴³ In light of the unsettled state of the law with respect to the viability of the fictionalization limitation, however, the Second Circuit certified the issue to the New York Court of Appeals.¹⁴⁴

In February 2000, the Court of Appeals resolved the issue.¹⁴⁵ Under this decision, a plaintiff cannot recover under the Statute where the defendant used the plaintiff's portrait or picture in a substantially fictionalized way without the plaintiff's consent if the use of the likeness was in conjunction with a newsworthy article.¹⁴⁶ Notably, however, the court stated that there is no inherent conflict in the precedents set by the *Finger-Arrington-Murray* line of cases and the older *Binns-Spahn* line.¹⁴⁷ The former line of cases binds the outcome in the *Messenger* case because those cases are directly on point: "All three cases involved the unauthorized, and allegedly false and damaging, use of plaintiff's photographs to

139. See 2000 WL 190553 at *1.

140. 175 F.3d 262.

141. See *supra* note 32 and accompanying text.

142. See 175 F.3d at 264-65.

143. See *id.* "Several factors suggest that *Finger* may have signaled the end of the fictionalization limitation . . . [B]y itself, the language of the New York Court of Appeals indicates that there are only two limitations to the newsworthiness exception . . ." (citing *Finger v. Omni Publications, Int'l*, 566 N.E.2d 141, 144 (N.Y. 1990)). *Id.*

144. See *id.* at 265-266. The court acted sua sponte, pursuant to Second Circuit Local Rule § 0.27, because the issue was "simply too important to New York . . . merely to make an educated guess about the state of the law." *Id.* at 266. See also *supra* note 12 and accompanying text.

145. See 2000 WL 190553.

146. See *id.* at *4.

147. See *id.* See also discussion of these cases, *supra*, Part IB.

illustrate newsworthy articles.”¹⁴⁸ The *Binns* and *Spahn* cases are distinguishable, according to the Court of Appeals, because they involved “defendants [who] invented biographies of plaintiffs’ lives. The courts [in these cases] concluded that the substantially fictional works at issue were nothing more than attempts to trade on the persona of Warren Spahn or John Binns.”¹⁴⁹ In such instances, the article will not fall under the newsworthiness exception, which was designed to protect the unfettered dissemination of news and matters of public interest, because the article is in essence a work of fiction.¹⁵⁰

The use of an individual’s likeness to illustrate a newsworthy item, however, presents a fundamentally different set of circumstances. Here, the individual cannot recover under the Statute, even when the use creates a false impression about the individual. In these cases, “the analysis centers on whether the photograph bears a real relationship to a newsworthy article and is not an advertisement in disguise. Where those requirements are met, there is no cause of action under the [Statute].”¹⁵¹ According to the court, recognizing a cause of action where an individual’s photograph is juxtaposed with a newsworthy article to create a false impression about the individual would be to recognize an action for common law false light invasion of privacy.¹⁵² New York law does not recognize a common law false light tort.¹⁵³

In his dissent, Judge Bellacosa disagreed with the majority’s interpretation of the newsworthiness exception.¹⁵⁴ Alluding to the right of publicity,¹⁵⁵ the dissent reasoned that had *Gruner + Jahr* used pictures of a public figure such as Shirley Temple to illustrate

148. 2000 WL 190553 at *4.

149. *Id.* at *4-*5.

150. *See id.* *See also* discussion, *supra*, Part IB.

151. 2000 WL 190553 at *5.

152. *See id.*

153. *See id.* (citing *Howell v. New York Post*, 612 N.E.2d 699, 703 (N.Y. 1993)).

154. 2000 WL 190553 at *5 (Bellacosa, J., dissenting) (“Under the analysis of the Per Curiam Opinion, no matter what the published photographs of plaintiff depict or connote, if the words of the column project an abstractly newsworthy subject matter, then the judicially created newsworthiness exemption forecloses the remedy of [the Statute].”).
Id.

155. *See supra*, note 16.

its column, the use would likely be actionable under the Statute as trading on the image of a celebrity.¹⁵⁶ Bellacosa opined that Messenger should likewise be protected under the Statute against the unauthorized exploitation of her persona.¹⁵⁷ The dissent concluded that the majority opinion was unsupported by precedent and fairness.¹⁵⁸ Moreover, the majority granted potential wrongdoers unilateral control over the operation of the newsworthiness exception to the Statute by shielding the unauthorized use of a person's photograph in conjunction with any remotely newsworthy article.¹⁵⁹

Following the Court of Appeals' determination that Messenger was not entitled to recover damages under the Statute, the case was returned to the Second Circuit. The Second Circuit vacated the judgment of the District Court, and remanded the case to the trial court for final disposition in light of the Court of Appeals decision.¹⁶⁰

III. THE POST-*MESSENGER* ERA: THE FUTURE OF PRIVACY IN NEW YORK

A. *Plaintiffs' Other Potential Causes of Action*

Critics of the Court of Appeals decision to foreclose relief under the Statute in *Messenger* may argue that future plaintiffs in comparable factual situations will be left without a remedy for the injuries they suffer. Indeed, some avenues of recovery are essentially unavailable to future plaintiffs under New York law. For example, Messenger's claim for the intentional infliction of emotional distress¹⁶¹ was dismissed under Florida law very early in her

156. See 2000 WL at *7-*8.

157. See *id.* Judge Bellacosa went on to distinguish the Court of Appeals 1990 decision in *Finger*, in which the court did not address the issue of substantial fictionalization limitation in spite of the extensive briefing of its potential availability under the Statute. *Id.* Judge Bellacosa joined the majority opinion in *Finger*. See generally, *Finger v. Omni Publications Int'l*, 566 N.E.2d 141 (N.Y. 1990).

158. See 2000 WL 190553 at *10.

159. See *id.*

160. See 208 F.3d 122 (2d Cir. 2000).

161. "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress" RESTATEMENT (SECOND) OF TORTS § 46 (1977).

case.¹⁶² Future plaintiffs in New York will likewise have difficulty proceeding under this cause of action because its elements are very difficult to satisfy¹⁶³ and because, in a setting akin to that in *Messenger*, the publisher of a newsworthy photograph will likely be protected under a reportorial privilege.¹⁶⁴ Likewise, because the right of privacy is governed exclusively by the Statute,¹⁶⁵ which essentially prohibits the misappropriation of an individual's identity,¹⁶⁶ the three other aspects of the right of privacy remain essentially unguarded in New York.¹⁶⁷ For instance, plaintiffs are unable to sue on a theory of false light¹⁶⁸ invasion of privacy.¹⁶⁹ Thus, future plaintiffs like Jamie Messenger will be limited somewhat in the availability of theories of complaint.

Despite these limitations, many alternative causes of action remain viable under New York law. Breach of contract actions are available to those, like Jamie Messenger, who consent to being photographed but are misled about the context in which their pictures will be used.¹⁷⁰ Breach of contract claims are also likely to

162. See *supra* notes 25-31 and accompanying text.

163. Under New York law, four elements must be met to sustain a cause of action: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." *Howell v. New York Post*, 612 N.E.2d 699, 702 (N.Y. 1993). Judge Kaplan noted that had Messenger's emotional distress claims would have likely failed even if they had been decided according to New York law. See *Messenger*, No. 97 Civ. 0136 (LAK) (S.D.N.Y. Jan. 21, 1998) at 60.

164. See *Howell*, 612 N.E.2d at 704-05. See also RESTATEMENT (SECOND) OF TORTS § 46.

165. See *Gautier v. Pro-Football*, 107 N.E.2d 485, 487 (N.Y. 1952); *Delan v. CBS, Inc.*, 458 N.Y.S.2d 608, 612 (N.Y. App. Div. 1983).

166. See *supra* notes 3-4 and accompanying text.

167. See *Howell*, 612 N.E.2d at 703. The New York legislature has rejected proposals to expand the protection of the Statute to encompass the three remaining privacy torts. See *id.*

168. False light invasions of privacy occur when a private individual is subjected to undesired and false publicity. See RESTATEMENT (SECOND) OF TORTS § 652E.

169. See 2000 WL 190553 at *5. Several other states have also rejected false light. SEE, E.G., *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998); *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994); *Renwick v. News & Observer Publ'g Co.*, 312 S.E.2d 405 (N.C. 1984).

170. See, e.g., *Wrangell v. C.F. Hathaway Co.*, 253 N.Y.S.2d 41, 42-43 (N.Y. App. Div. 1964) ("In essence, plaintiff's action is for breach of contract, that is, the use of his photograph in excess of the right and privilege which he granted to defendant. [The Statute] does not afford relief for mere breach of contract.").

succeed in cases like *Gautier*, where plaintiffs agree to appear in public on the condition that they not be photographed.¹⁷¹ In addition, some plaintiffs will have viable complaints under a defamation theory.¹⁷² Had Messenger's libel claim been determined according to New York law, she would have had an excellent chance of succeeding on the merits.

Where there is unauthorized use of a celebrity's image, the right of publicity will very likely apply. While the right of privacy redresses the hurt feelings of all whose identities are commercially exploited, celebrities have an additional property interest in the commercial value of their identities.¹⁷³ The right of publicity guarantees celebrities the exclusive right to control and profit from the commercial marketing of their own valuable likenesses.¹⁷⁴

Thus, there are other causes of action available to plaintiffs who have no claim under the Statute because their photographs were used in conjunction with newsworthy articles. Plaintiffs with grievances like Messenger's clearly suffer injuries that should be redressed by the courts.¹⁷⁵ New York provides remedies for those injuries in bodies of law outside the Statute.¹⁷⁶ It is therefore highly unlikely that a plaintiff suffering injuries identical to Messenger's will lack a viable cause of action under New York law.

171. See *Gautier v. Pro-Football*, 107 N.E.2d 485, 489 (N.Y. 1952).

172. In order to recover on a libel claim in New York, a plaintiff must establish five elements: "1) a written defamatory statement of fact concerning the plaintiff; 2) publication to a third party; 3) fault (either negligence or actual malice depending on the status of the libeled party); 4) falsity of the defamatory statement; and 5) special damages or per se actionability (defamatory on its face)." *Celle v. Filipino Reporter Enters. Inc.*, 2000 WL 376638 (2d Cir. Apr. 12, 2000) (citations omitted). See also Restatement (Second) of Torts § 558. False statements concerning a woman's chastity have been held to be actionable per se in the past. See, e.g., *Privitera v. Town of Phelps*, 435 N.Y.S.2d 402, 404 (N.Y. App. Div. 1981) (listing five categories of slanderous per se statements). See also Restatement (Second) of Torts § 570. Messenger's libel claim, however, was dismissed under Florida law. See 994 F. Supp. at 527 n.1. See also *supra* notes 25-31 and accompanying text.

173. See, e.g., *Delan v. CBS, Inc.*, 458 N.Y.S.2d 608, 615 (N.Y. App. Div. 1983).

174. See *Haelan Lab., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir.), cert. denied, 346 U.S. 816 (1953); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 728 (S.D.N.Y. 1978).

175. See, e.g., *Messenger*, 994 F. Supp. at 527 ("[T]he New York courts have not disregarded the interests of persons victimized by falsehood.").

176. See *supra*, notes 170-74 and accompanying text.

B. *The Benefits of Messenger*

The *Messenger* decision is an important one not only for the clarity it provides in misappropriation cases brought under the Statute, but also because it confines the substantial fictionalization limitation to a certain class of cases rather than eradicating the doctrine altogether.¹⁷⁷ As noted by the Court of Appeals, the trend in New York over the past several decades has been to consider substantial fictionalization only where a defendant has created distorted or wholly imagined biographical information about celebrities or public figures.¹⁷⁸ The Statute will apply under these circumstances because there is little or no truth in the articles published, and thus no news value in the work to protect. Rather, these situations amount to nothing more than unauthorized uses of celebrities' names or images to increase profits- clear examples of uses for the purposes of trade. Courts deciding these cases need not be concerned with constitutional protections of speech and the press because those rights do not safeguard the knowing dissemination of falsity.¹⁷⁹

Cases involving the use of a private person's photograph in conjunction with a newsworthy item, however, present strikingly different scenarios and should therefore be evaluated under different standards.¹⁸⁰ The distinction the Court of Appeals has drawn between these classes of cases¹⁸¹ will create uniformity and predictability of the outcomes of future complaints under the Statute.

177. See 2000 WL 190553 at *4. See also *supra*, text accompanying notes 48-51.

178. See 2000 WL 190553 at *4-*5.

179. See *Davis v. High Society Magazine, Inc.*, 457 N.Y.S.2d 308, 314-15 (N.Y. App. Div. 1982).

180. See *id.* at *4. Despite the jury's finding in favor of Jamie Messenger, the likelihood that the average reader would believe that Messenger composed the "Mortified" letter is debatable. Certainly the target audience of teenage girls has enough collective sense to find that an author who assumes a pseudonym to maintain anonymity is unlikely to pose for photographs illustrating the events described in her letter. This author is of the opinion that the vast majority of the target audience thus would view the pictures of Messenger for what they actually are: mere representations of the emotions experienced by a teenage girl in the aftermath of an embarrassing and potentially dangerous sexual escapade. See also Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 14-15, *Messenger*, 994 F. Supp. 525 (S.D.N.Y. 1998) (No. 97 Civ. 0136 (LAK)).

181. See 2000 WL 190553 at *4-*5.

Future plaintiffs retain significant protection against commercial exploitation under the advertisement in disguise and real relationship doctrines. Thus, nearly a century after the enactment of the Statute,¹⁸² New York law continues to proscribe the conduct the Statute was intended to prohibit.¹⁸³

Despite the general clarity of the *Messenger* decision, some of the court's reasoning in reaching the decision is flawed. First, by its own terms, the Statute applies exclusively in cases involving the use of a picture for trade or advertising purposes.¹⁸⁴ Clearly, neither trade nor advertising issues were involved in the case. At the risk of oversimplifying the issues that were litigated, the courts could have stated plainly and succinctly that the Statute does not apply under the circumstances involved in *Messenger*. Thus, the extended discussions of the newsworthiness doctrine in this case and in similar cases are essentially unnecessary and virtually disingenuous. Simply stating that *Messenger*'s picture was not used for trade or advertising purposes would save future courts from having to expand the seemingly endless body of "newsworthy" subject matter.

Second, assuming *arguendo* that the "Love Crisis" column did create a false impression about *Messenger*, her resulting injury should not be redressed under the Statute. The Court of Appeals implied, but did not explicitly hold, that the truth or falsity of an impression created by the use of an individual's photograph will not dictate whether the use is for trade or advertising purposes.¹⁸⁵ Rather, "substantial fictionalization" claims should fall under another cause of action, such as defamation or breach of contract.¹⁸⁶ Thus, the *Binns* and *Spahn* cases¹⁸⁷ essentially do not involve the Statute, and should have been decided on other grounds.

Finally, the Court of Appeals should have unmistakably pointed out that granting relief under the Statute in this case would have imposed a crushing burden on the press. The gravamen of

182. See L.1903, ch.132.

183. See *Davis*, 457 N.Y.S.2d 308, 314 (N.Y. App. Div. 1982).

184. See N.Y. Civ. Rights Law §§ 50-51 (McKinney 1998).

185. See *Messenger*, 2000 WL 190553 at *2-*5.

186. See discussion, *supra*, Part IIIA.

187. See discussion, *supra*, Part IB.

the statutory claims in *Messenger* and *Arrington*¹⁸⁸ is virtually indistinguishable: though the articles were not advertisements in disguise and the pictures bore real relationships to the subject matter of the magazine articles, the Plaintiffs disliked the content of those articles. Were relief to be granted in such situations, the press effectively would be forced to locate and compensate models (who approve of the ideas asserted in every article) to illustrate their stories. This result would decimate Constitutional protections of speech and press.

Nevertheless, the Court of Appeals decision does preserve the First Amendment rights of the media, thereby fortifying the free dissemination of news and information. While the protection of the right of privacy is the primary aim of the Statute, the courts have consistently made clear that from a policy perspective, shielding the right of the media to communicate news and ideas is of paramount importance.¹⁸⁹ “Freedom of expression preserves all other liberties so inseparably that freedom of the press and a free society either prosper together or perish together.”¹⁹⁰ *Messenger* encourages the press to illustrate its stories with images of people who are reasonably related to the subject matter, albeit not through commercial exploitation, in order to illuminate its articles and educate the public. Furthermore, *Messenger* instructs the courts to protect the right of the press to do so.

CONCLUSION

Over the course of the 110 years that have elapsed since Warren and Brandeis authored their famous law review article, New York’s legislature and courts have endeavored to define the right of privacy. The Court of Appeals decision in *Messenger* appears at first to have scaled back on this right as it relates to private individuals whose photographs are published without their consent. Rather than diminishing the right of privacy, however, *Messenger* simply took another step in defining it. This case is the latest and clearest in a series, spanning three decades, that dictates that the

188. See discussion, *supra*, Part IC.

189. See *supra* notes 66-70 and accompanying text.

190. *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 127 (2d Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).

authors and publishers of newsworthy stories are free to illustrate their articles with photographs that reasonably relate to the content of the articles. New York courts consistently interpret the newsworthiness exception to the Statute liberally because it protects rights of paramount importance to society. Although staunch defenders of the right of privacy may interpret this Court of Appeals decision as having narrowed the scope of the right, *Messenger* reaffirms the longstanding proscription of the unauthorized commercial exploitation of private persons, while emphasizing that privacy is not an absolute right. The courts will continue to safeguard newsworthiness under the Statute, albeit to the dissatisfaction of some plaintiffs.

Messenger represents an exercise in the judicial balancing of competing interests. While the freedoms of speech and the press seem to have won the day in *Messenger*, the Court of Appeals made it clear that private individuals and the media are not engaged in a zero-sum contest over the right of privacy. Thus, *Messenger* guarantees that constitutional protections of the media are not disturbed, while preserving the right of privacy in the instances contemplated by those who drafted and enacted the Statute.

Though the boundaries of the newsworthiness exception and the scope of the protection provided under the Statute remain somewhat hazy, the *Messenger* case has provided courts with a clear beacon as they navigate New York's privacy law. Future courts should use the decision as a guide in defining and applying the right of privacy in New York.