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In this issue

A Post-*Borat* Reprieve on Reality-Based Programming

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Some may question whether the film *Borat* is better known for its critical and commercial success or for the lawsuits that the film spawned. For those who have not seen the film, *Borat* is a mockumentary comedy starring the British comedian Sacha Baron Cohen in the title role of a fictitious Kazakh journalist traveling and recording real-life interactions with people. Not surprisingly, some who had interaction with Cohen were unhappy about their fifteen minutes of fame.

For instance, two University of South Carolina fraternity brothers who appeared in the film sued the producers, claiming that the film defamed them, that they were drunk when they agreed to participate in the film, and that the producers had falsely told them that the movie would not be shown in the United States.[1] That suit was dismissed in February 2007, primarily on the basis of California's anti-SLAPP statute.[2]

In another lawsuit, the residents of Glod, a village in Romania, sued the producers of *Borat*, complaining that they were lied to and told that it was a documentary about extreme poverty in Romania that would fairly depict their lives, living conditions, occupations, community, heritage, and beliefs.[3] As of the writing of this article, the lawsuit remains pending.

Additional lawsuits also are pending. In March 2007, a Mississippi resident filed an invasion of privacy and false light lawsuit in the U.S. District Court for Mississippi.[4] In July 2007, a New York resident filed suit claiming that his brief appearance in the film violated New York state's right of publicity statute, N.Y. Civil Rights Statute § 51.[5] In October 2007, five Alabama residents filed suit in an Alabama federal court, alleging that the film's makers used fraud to obtain releases from them, and brought claims that include invasion of privacy and false light.[6] More recently, a driving instructor in Maryland filed suit on December 3, 2007, in the U.S. District Court for the Southern District of New York against the makers of the film, claiming that they fraudulently induced him to sign documents allowing his appearance in the film.[7]

Of course, the creation of works such as documentaries and reality television programs that feature real people is not a new phenomenon. But the legal problems stemming from the release of *Borat* demonstrate that using nonactors or the names or images of such people in a film or on television can lead to a variety of legal claims (such as violation of the right of publicity, defamation, and private facts claims, among others) once the real people see how their images are used. Moreover, as we venture further into the brave new world of user-generated content, e.g., avatars on Second Life and other uses yet to be seen, these issues have even greater importance for programmers and distributors.

First Amendment Versus Right of Publicity

It is broadly accepted that the First Amendment offers protection to film and television programs, whether the

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victim are identical to those professed by a plaintiff in a libel case. Any juror who can say, "I have seen this movie before, and I know how the plaintiff feels," is very dangerous for a defendant. Thus, you have to think outside the box and inquire about life experiences that would produce the same emotional response as the one professed by the plaintiff because, more than anything else, such experiences would be highly predictive of a dangerous juror.

Think of your voir dire questioning of jurors as the opportunity to go diving and explore the underwater component of the iceberg.

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Spotting the Stealth Juror

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The case that generates a large amount of publicity prior to trial is bound to attract the stealth juror. The stealth juror is the person who is lying in wait to either convict or acquit your client in a criminal case. Similarly, this same type of individual may be lurking in the jury pool waiting to pounce on the high-profile corporate client in a civil case. Obviously, it is imperative that you identify the stealth jurors and strike them from your panel.

In a high-profile case, it is crucial to propose a written juror questionnaire as a first step in identifying potential bias. Although the judge has discretion over whether to grant such requests, it is becoming the norm in high-profile cases. You should always take the lead in drafting the prospective juror questionnaire and ask these questions:

- Have you followed any cases similar to this case (mention a case or two)?
- What did you think about the outcome of that (those) case(s)?
- Have you had any conversations about this case?

Stealth jurors will, oftentimes, have strong attitudes about similar high-publicity cases but when asked about the current case will say something like, "While I'm aware of the case, I haven't formed any opinions." Your antennae should immediately shoot up with this type of response. A potential challenge for cause could also be developed around this type of contradictory response.

I agree with Richard Goehler's suggestions in the previous edition of *Communications Lawyer* regarding his strategy in asking jurors about their experiences with the media. However, I would add the following questions aimed at finding out how active this potential stealth juror has been with past issues:

- Have you ever written a letter to the editor of a newspaper or magazine? If so, what was the subject of that letter?
- Have you ever called into a talk radio show? If so, what was the subject of that call? What radio station and show?
- Do you use the Internet? If so, have you ever participated in a blog? If so, what was the subject of the blog?
- Have you ever participated in a city council meeting? If so, did you speak at the meeting, and what was the subject of your speech?

With increasing numbers of people using the Internet, it has been fascinating learning about potential jurors' blogging habits. During jury selection, it's a good idea to Google each of your potential jurors. It's amazing to see what a Google search can unearth with regard to information that a potential juror might not volunteer.

Have someone in the courtroom (co-counsel, a paralegal, or a consultant) serve as your eyes and ears during the voir dire process. Because voir dire is an interview of sorts, it is important that your time with each prospective juror be uninterrupted. Don't write down jurors' responses to your voir dire questions; have someone else do it. Your job is to be a good listener and follow up with any confusing responses that the juror may provide. Finally, it is critical to train your courtroom assistant to note the facial expressions and demeanor of the prospective juror. I've seen many trials in which lawyers haven't seen a particular glance, sneer, or tear from a juror being questioned because they were writing a note. Leave the writing process to your assistant so that appropriate arguments can be made for challenges for cause, hardship, etc. Judges have often granted a potential challenge for cause when attorneys supplement their arguments with notes regarding the stealth juror's demeanor.

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*A Post-*Borat *Reprieve on Reality-Based Programming*

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program is reality or fiction or somewhere in between, such as *Borat*. As the California Supreme Court found nearly thirty years ago in a case dealing with a fictionalized portrayal of Rudolph Valentino,

> [o]ur courts have often observed that entertainment is entitled to the same constitutional protection as the exposition of ideas. That conclusion rests on two propositions. First, "[t]he line between the informing and the entertaining is too elusive for the protection of the basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another doctrine." (*Winters v. New York* (1948), 333 U.S. 507, 510 [92 L. Ed. 840, 847, 68 S. Ct. 665].) Second, entertainment, as a mode of self-expression, is entitled to constitutional protection irrespective of its contribution to the marketplace of ideas.[8]

Nonetheless, the right of publicity gives individuals the right to control the use of their names or likenesses to sell a product or service.[9] Typical elements for a prima facie action are as follows: (1) the plaintiff owns an enforceable right in the identity or persona of a human being; (2) the defendant, without permission, has used some aspect of the identity or persona in such a way that the plaintiff is identifiable from

the defendant's use; and (3) such use is likely to cause damage to the commercial value of that persona.[10] Jurisdictions are split as to whether the plaintiff must be a celebrity, but the majority rule is that noncelebrities have a right of publicity.[11]

Is a Release Always Necessary?

As is well known, not every use is sufficient to support a claim, and many decisions hold that a de minimis or fleeting reference to a plaintiff is not actionable.[12] For example, a woman filmed on the street and included in a nine-second opening sequence of a movie was held to be incidental use under New York's right of publicity statute.[13]

In addition to incidental use, a release probably is not needed for a film or program that uses nonactors if the names or likenesses are used in a nondefamatory manner, unless there are embarrassing private facts shown or a separate commercial use, i.e., merchandising. Even then, if the claim is based on a portrayal of embarrassing private facts, the best defense likely will be a defense that the allegedly private facts were not, in fact, private.

Saying that a release might be needed for a commercial use is easier said than applied.

For instance, in *Ruffin-Steinback v. de Passe*,[14] the family of Davis "David" Ruffin and three other people filed suit over a miniseries docudrama depicting the story of the Motown act the Temptations. Plaintiffs included Josephine Miles, the wife of one of the original members of the Temptations, who claimed invasion of privacy based on the public disclosure of private embarrassing facts relating to her out-of-wedlock pregnancy.[15] The court dismissed her claim, ruling that the information was merely giving publicity to information that already was public because the miniseries was based on a book that discussed her pregnancy.[16] Furthermore, any birth or marital records relating to Miles's pregnancy were also available in the public record.[17] The court concluded, "[I]t cannot seriously be contended that Miles' premarital pregnancy, while perhaps embarrassing, is a private fact."[18]

Similarly, in *Gregorio v. CBS, Inc.*, a federal court dismissed a lawsuit brought by a man whose image was used in a television news story on romance in New York.[19] The program showed plaintiff walking and holding hands with a woman who was his coworker. Plaintiff, however, was married to someone else, and the woman was engaged to another person. Plaintiff filed claims of invasion of privacy, intentional infliction of emotional distress, prima facie tort, and defamation. The court dismissed his claims, in part because the film was shot in the ordinary course of business in public on Fifth Avenue and the report did not state expressly that he was having an illicit affair with a coworker.[20]

Commercial Use

Of course, a release is critical where the person's image or name will be used for a "commercial purpose," given the likely lower level of protection from the First Amendment.[21] In addition, nineteen states have statutes expressly recognizing a claim for violation of one's right to publicity based on a commercial use.[22]

Generally, advertisements that merely promote the film or program and include people within the work are not actionable.[23] A producer should be aware, however, that although the First Amendment may fully protect expression in one format, such as the film itself or advertisements promoting the film, a later use in connection with a commercial product may be actionable.[24] For example, a New York court held that a 1945 photograph of a sailor kissing a nurse on V-J Day was protected news when it was first published, but the sailor in the photo adequately stated a right of publicity claim based on *Time* magazine's sale some forty years later of copies of the photo for $1,600 each because the sale was a "commercial use."[25]

Saying that a release might be needed for a commercial use is easier said than applied in real situations because the line between what is or is not a commercial use may be vague and is usually fact-specific. For instance, in *Hoffman v. Capital Cities/ABC, Inc.*,[26] the actor Dustin Hoffman sued *Los Angeles Magazine* on claims that the magazine violated his right to publicity based on common law and California statute.[27] The magazine had used a picture of Hoffman from the movie *Tootsie* for a spring fashion spread.[28] The clothes were modeled by publishing pictures from well-known movie scenes and using computer technology to change the clothing. The Ninth Circuit held that the fashion section was not a commercial use.[29] The court stated that the article was not a traditional advertisement printed merely to sell a product, and the designers did not give the magazine any consideration for featuring their clothes.[30] The article also did not simply present a commercial message:

> It is a complement to and a part of the issue's focus on Hollywood past and present. Viewed in context, the article as a whole is a combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors. Any commercial aspects are "inextricably entwined" with expressive elements, and so they cannot be separated out "from the fully protected whole."[31]

In contrast, the Ninth Circuit held in *Downing v. Abercrombie & Fitch*[32] that the use in an advertising campaign with a surfing theme of old photographs of surfers taken at a surf championship was a commercial use. The court held that the relationship between the photograph and the surfing theme was too tenuous.[33]

In a different medium, the commercial use exception received only a glancing mention in a recent right of publicity case brought against a video game distributor. In *Kirby v. Sega of America*, a California appellate court held that the First Amendment protected the distributors of a video game from a right of publicity claim brought by the lead singer of a band.[34] The singer had claimed that the distributors misappropriated her likeness in creating a character for the game. The appellate court gave little weight to the commercial speech doctrine, stating in a footnote that "[e]ven commercial speech receives significant First Amendment protection, unless it is false and misleading."[35]

A Fine Line

Going forward, there is a risk that industry "custom and practice" may further blur the line between commercial and protected uses and thus blur

when releases are advisable. Although the seeking of releases when they are not strictly required is understandable as a backstop and may be a factor in obtaining insurance (even if not strictly required), courts may react to evolving industry practice and question why some releases were obtained but others were not. The frenzy of seeking releases for participants that sometimes arises around controversies appears to have become less frequent, but producers and creators should still be alert to a tendency to overuse releases; otherwise, courts, over time, may assume that they should always be obtained. In short, although, as a practical matter, releases may sometimes be necessary for insurance or other reasons, I urge producers to be ready to push back based on the First Amendment and other protections.

Terms of the Release

Saying that a release is needed does not end the discussion. Too often, producers use form releases that may not reflect how or where the image will be used. To the extent possible, releases should be tailored for the particular use. Of course, the repurposing that occurs today in venues ranging from YouTube and the Internet to local home videos that become national news must be taken into account. Thus, every release should also have a clause for "uses now or hereafter available." And given the risks of oral agreements and the prospect of global production, all releases should include integration and merger clauses as well as choice of law and forum provisions.

It is also important to review the release to determine what claims are waived and whether the release is revocable. Then it will be up to the producer to make sure those limits are respected. If the producer fails to discern those limits, the results can be costly.

In *Christoff v. Nestle USA*,[36] Russell Christoff had posed gazing at a cup of coffee for a photo shoot arranged by Nestlé Canada. He was paid $250 for his time and received a contract governing the use of his image. The release stated that if Nestlé Canada used the picture on a label it was designing for a brick of coffee, Christoff would be paid $2,000 plus an agency commission. The contract also provided that the price for any other use of Christoff's image would require further negotiations. Nestlé Canada used Christoff's image on the coffee brick.[37]

Eleven years later, Nestlé redesigned its label and included Christoff's image.[38] The person who used the image believed she had authority to do so because she knew it was widely used in Canada. The employee did not investigate the scope of the consent and never checked back with Christoff. Thereafter, the redesigned label was used on several different Taster's Choice jars, including regular and decaffeinated coffee and various flavored coffees, and on products sold internationally. In 2002, Christoff discovered the use of his picture when he was shopping and happened to see a can of Taster's Choice instant coffee. A jury awarded him $15,305,850;[39] however, an appellate court has since reversed the judgment and ordered a retrial.[40]

Unenforceable Releases

Courts interpret releases like other contracts and apply general principles of contract law to them.[41] Like any other contract, a release will be unenforceable if it is obtained through fraud[42] or is unconscionable. This means, at a minimum, that producers should be forthright with the individual, avoid misleading statements or omissions of material facts,[43] act in good faith, and not conceal relevant information.[44] In California, it is well settled that "[t]he failure to disclose material facts affecting the essence of a release agreement may constitute actual fraud vitiating the contract."[45] If a producer obtains a release based on fraud, the release could be voidable.[46] New York adheres to the same doctrine.[47]

In addition to an action for fraud or breach, the producer may be open to a claim of violation of the right to privacy. For example, in *Braun v. Flynt*, a theme park worker consented to having her picture used in promotional materials.[48] The park then allowed a men's magazine to use the photograph after the editor allegedly misrepresented the nature of the periodical. The employee sued, and the jury granted punitive damages for invasion of privacy. According to the *Restatement (Second) of Torts*, "[c]onsent to any publication of matter that invades privacy creates an absolute privilege so long as the publication does not exceed the scope of the consent."[49] In contrast, there are New York cases that hold that use outside the agreed-upon medium (e.g., consenting to use in a magazine advertisement but not a poster advertisement) does not violate the right of privacy.[50]

In addition, a court may refuse to enforce a contract if it deems that both the procedure used to obtain consent and the substantive terms of the agreement violate public policy. Both procedural and substantive elements may be required, and they act in concert so that the more objectionable the method of gaining consent, the less unconscionability is required in the actual terms.[51] The most important factor to a court is the relative bargaining power of each party. For instance, in *Heyert v. Owens*, a fine arts photographer obtained an initial release to photograph bodies prepared in a traditional southern funerary style.[52] The original agreement offered no compensation to the owner of the funeral home or the families of the deceased subjects. Although the funeral home owner later attempted to execute an agreement for compensation, the court had no difficulty in finding that the original agreement was binding because Owens was a sophisticated businessman and the families of the deceased had signed valid releases handing over all rights of publication.[53]

In a recent California case concerning mobile phone agreements, a court ruled that contracts of adhesion, such as standard releases, automatically raise a minimal degree of procedural unconscionability.[54] As long as contracts do not also contain a high degree of substantive unconscionability, however, such as provisions that take unfair advantage of the weaker party, they will be enforced.[55] If, on the other hand, a producer sought to enforce a very broad form release that reached every imaginable use and the actual use was wholly unrelated to the use described when the waiver was obtained, a plaintiff might have success with an unconscionability claim.

Consent Issues

The statutes of seven states (Massachusetts, New York, Ohio, Rhode Island, Utah, Virginia, and Wisconsin) require that a consent of that state's statutory right to publicity be in writing.[56] In addition, California, Oklahoma, and Tennessee provide that consent is necessary, thus implying that consent may be

either oral or written.[57] A Florida statute provides for written or oral consent, and a Nebraska statute allows for express or implied consent.[58] The New York courts have held that consideration is not required to make a consent valid.[59]

Another frequent question is whether the individual is capable of giving consent. Courts will refuse to enforce a release if one of the parties, because of immaturity or mental infirmity, lacked the capacity to enter into it. Thus, a contract made with a minor is voidable.[60] Under common law, a minor has the right to repudiate a contract made by guardians on his behalf. This right can be overcome by statutory provision, as has happened with New York Civil Rights Statutes § 50 and § 51, which have been interpreted to allow parents to sign away a minor's rights of publicity and privacy.

Not surprisingly, several high-profile cases involve young models whose pictures, taken with the consent of their parents, were later used in advertisements or featured in magazines without the permission of the model. In a 1982 lawsuit, Brooke Shields tried to prevent a photographer from distributing nude pictures he had taken of her at a young age after obtaining her parents' consent. The lower court in *Shields v. Gross* held that the common law rule allowing minors to disaffirm consent was so important to public policy, particularly in a case like this, that the legislature would have to explicitly preempt it.[61] Still, the appellate court upheld the release.[62] Twenty-some years later, when model Liliana Alvidrez brought suit in 2005 to enjoin Getty from using photographs taken when she was a minor, the court would not hear excuses as to why it should not enforce parental consent.[63] The Fifth Circuit also has ruled that California law recognizes the validity of parental consent as binding on minors.[64]

Mental incapacity extends beyond permanent disability and may encompass drunkenness and drug-induced impairment. However, a contract will be voidable only if the other party has reason to know of the incapacity, meaning, for instance, that it would hardly be advisable to get a subject drunk and then have him sign a consent form.[65] And, not surprisingly, a defense of poor judgment is not enough to absolve a party of a contractual obligation; the First Amendment may still prevail. Thus, at least one court has held, in a case involving a mentally disabled person, that if the use is for a noncommercial purpose, the validity of the consent is irrelevant.[66]

Revocation of Permission

As a general rule of contract law, if the subjects of a film or television program, after signing a consent form, change their minds and try to revoke permission, they will be breaching the contract, though a court likely will not compel them to appear in a movie or participate in any other way.[67]

The timing of the revocation does matter; thus, the earlier the consent is revoked, the less likely a court is to find a breach.[68] Of course, individuals may disagree about what constitutes a timely revocation. In *Virgil v. Time, Inc.*, a surfer who was included in a *Sports Illustrated* article on surfing agreed to be interviewed for the article but withdrew his consent after the article was written and while the magazine was going through the fact-checking process.[69] The Ninth Circuit reversed the lower court's grant of summary judgment, stating that if consent is withdrawn before publication, any resulting publicity may result in a claim for violation of the right of privacy, including disclosure of private facts.[70] In a footnote, the appeals court observed that "[t]here may be cases where requiring that an eleventh-hour change of mind be honored would unfairly burden the publisher and where it could not, for that reason, be regarded as a timely revocation of consent. This is not such a case."[71]

If a release is without consideration, the individual's ability to revoke a consent will depend on whether the court will apply the concept of estoppel.[72] For instance, one New York court held that a performer, Mary Garden, could revoke, some twenty-four years later, a gratuitous license she gave to a perfume company to use her name to promote the perfume.[73]

Anti-SLAPP Laws

Finally, producers may be able to rely on an anti-SLAPP statute to have claims dismissed prior to a finding of the validity of consent. Twenty-four states have implemented anti-SLAPP laws.[74] For instance, California's anti-SLAPP rule provides parties being sued for speech activities the ability to file a special motion to strike.[75] If the court believes that the suing party will not prevail, it may throw out the suit and assess attorney fees.

The value of an anti-SLAPP motion is shown by the *Borat* fraternity brother case. In its ruling, the court noted that

> the only issue before it today is the narrow inquiry of whether this action constitutes what our Legislature has denominated as a "SLAPP"—a strategic lawsuit against public participation. The propriety of filming individuals, often in crude contexts and with a disarming disguise, with the specific intent of later embarrassing them on a national scale . . . is not before the court. . . . The Court cannot and does not reach the topic of whether the Defendants' conduct is appropriate or conscionable; the only question is whether a legal claim survives.[76]

Getting a valid release may be more complicated than many producers realize.

Similarly, the television program *Celebrity Justice* is defending itself against a privacy claim brought by Marlon Brando's former housekeeper by relying in part on California's anti-SLAPP statute. In *Hall v. Time Warner, Inc.*, Blanche Hall, Brando's former housekeeper and a named beneficiary in his will, filed suit against *Celebrity Justice*, alleging claims that included trespass, intrusion upon seclusion, and public disclosure of private facts.[77] The show's producers had filmed Hall, who suffers from dementia and Alzheimer's disease, at the nursing home where she lived. The producers maintained that she consented to an on-camera interview.[78] Defendants filed a motion to strike the complaint based on the anti-SLAPP statute, but the trial court denied the motion, stating that Hall's complaint did not arise from defendants' free speech rights in connection with a public issue. The appellate court disagreed and stated that although Hall was a private person and may not have voluntarily sought publicity, she was

involved in an issue of public interest; thus, defendants' conduct met the first prong of the anti-SLAPP statute.[79]

Conclusion

In summary, if producers decide to use a release, getting a valid one may be more complicated than they realize. The *Borat* litigation highlights the potential risk of entering into a contractual relationship with a subject in order to get a waiver. Whether a release is used, knowing how much information to give in order to obtain consent can be a thorny issue. Although some disclosure is required, being entirely frank with the nonactor may well limit how candid your subject will be and how you will be able to use the product later.

However, producers of a film or television program who use real people may not need a release as often as they might think. My rule of thumb is to worry first about peripheral characters who might have embarrassing private facts claims, e.g., family members. For peripheral characters about whom the producer is not showing private facts, I would urge producers to carefully consider whether releases are needed. As to main characters, there are often production or insurance reasons to obtain releases from them, but producers should at least inquire whether there is enough of a public record on which to base a story protected by the First Amendment. ☐

Endnotes

1. Nicole LaPorte, *"Borat" Win in Frat Spat*, DAILY VARIETY, Dec. 12, 2006.

2. Doe v. Am. Prods., Inc., No. SC091723 (L.A. County Super. Ct. Feb. 15, 2007) (unpublished). Anti-SLAPP (Strategic Lawsuit Against Public Participation) legislation was designed to prevent parties from being sued frivolously.

3. *See Lawsuit Sues "Borat" Makers on Behalf of Romanian Villagers*, USA TODAY, Nov. 20, 2006.

4. Johnston v. Am. Prods., Inc., 2:07-cv-00042-WAP-EMB (N.D. Miss. Mar. 20, 2007).

5. Cedeno v. 20th Century Fox Film Corp., 07 CIV 7251 (LAP) (S.D.N.Y. Aug. 14, 2007).

6. Streit v. 20th Century Fox Film Corp., 2:07-cv-1918-IPJ (N.D. Ala. Oct. 19, 2007).

7. Psenicska v. 20th Century Fox Film Corp., 1:07-CV-10972 (S.D.N.Y. Dec. 3, 2007).

8. Guglielmi v. Spelling-Goldberg Prods., 25 Cal.3d 860, 868 (1979).

9. *See* 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 3:1 (2d ed. 2007) (defining the right of publicity as the "inherent right of every human being to control the commercial use of his or her identity"). A similar tort is appropriation of likeness: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." RESTATEMENT (SECOND) OF TORTS § 652C (1977). The difference between right of publicity and appropriation turns generally on the alleged harm to the plaintiff. Alleged harm to the commercial value of the plaintiff's name or image is likely to be a right of publicity claim, while alleged harm to one's emotions or self-esteem is usually a claim for appropriation of name or likeness.

10. MCCARTHY, *supra* note 9, § 3:2 (citation omitted).

11. *Id.* § 4:16.

12. *Id.*

13. Preston v. Martin Bregman Prods., Inc., 765 F. Supp 116 (S.D.N.Y. 1991); *see also* Gregorio v. CBS, Inc., 473 N.Y.S.2d 922, 924 (N.Y. Sup. Ct. 1984). *But see* Nieves v. Home Box Office, Inc., 815 N.Y.S. 2d 495 (N.Y. Sup. Ct. 2006), *aff'd*, 30 A.D. 2d 1143 (N.Y. App. Div.) (denying defendant's motion to dismiss on the basis that there was a question of fact as to whether the use of plaintiff's image bore a "real relationship" to defendant's program).

14. Ruffin-Steinback v. de Passe, 82 F. Supp. 2d 723 (E.D. Mich. 2000).

15. *Id.* at 734.

16. *Id.*

17. *Id.*

18. *Id.*

19. Gregorio v. CBS, Inc., 473 N.Y.S.2d 922 (N.Y. Sup. Ct. 1984).

20. *Id.* at 926–27. The more apposite claim in this situation would seem to be false light. However, New York does not recognize false light as a tort. *See Messenger v. Gruner + Jahr Printing & Publ'g*, 727 N.E.2d 549, 556 (N.Y. 2000).

21. MCCARTHY, *supra* note 9, § 7:2.

22. California, Florida, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin all recognize the right of publicity. Many of the state statutes are modeled on New York law. *See id.* §§ 6:7-6: 132.

23. *See, e.g.*, Guglielmi v. Spelling-Goldberg Prods., 25 Cal.3d 860, 873 (1979) ("It would be illogical to allow respondents to exhibit the film but effectively preclude any advance discussion or promotion of their lawful enterprise.").

24. MCCARTHY, *supra* note 9, § 7:21.

25. Mendosa v. Time, Inc., 678 F. Supp. 967, 973 (D.R.I. 1988).

26. Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001).

27. *Id.* at 1183.

28. *Id.*

29. *Id.* at 1185.

30. *Id.*

31. *Id.* (quoting Gaudiya Vaishnava Soc'y v. City & County of S.F., 952 F.2d 1059 (9th Cir. 1990)).

32. 295 F.3d 994 (9th Cir. 2001).

33. *Id.* at 1002. *See also* Abdul-Jabbar v. Gen. Motors Corp., 75 F.3d 1391, 1400–01 (9th Cir. 1996) (holding that an advertisement that attracted attention by discussing the basketball player Kareem Abdul-Jabbar's record as an outstanding player and then promoting the advertiser's car was actionable because it was used in the context of an advertisement rather than a sports or news account).

34. Kirby v. Sega of Am., Inc., 144 Cal. App. 4th 47, 48, 61 (2006).

35. *Id.* at 58 n.5.

36. Christoff v. Nestle USA, No. B182880, 2007 WL 1874240 (Cal. Ct. App. July 24, 2007).

37. *Id.* at *1.

38. *Id.* at *2.

39. *Id.* at *3.

40. *Id.* at *19. *See also* Clark v. Celeb Publ'g, Inc., 530 F. Supp. 979 (S.D.N.Y. 1981) (holding that plaintiff was entitled to recover damages where she consented to have her photo used in *Penthouse* magazine but never authorized the use of her image in a pornographic magazine or the magazine's advertisements); Manger v. Kree Inst. of Electrolysis, Inc., 233 F.2d 5 (2nd Cir. 1956) (affirming a jury verdict where plaintiff had written a prize-winning letter and agreed to have the letter and her picture published in a magazine, but defendant changed her letter to make it an endorsement of defendant's product).

41. Marder v. Lopez, 34 Media L. Rptr. 1769, 1771 (9th Cir. 2006) ("The interpretation of a release is governed by the same principles applicable to any other contractual agreement."); Gen. Motors Corp. v. Superior Court, 12 Cal. App. 4th 435 (Cal. Ct. App. 1993) ("[T]he interpretation of a release or settlement agreement is governed by the same principles applicable to any other contractual agreement."); Metz v. Metz, 572 N.Y.S.2d 813 (N.Y. App. Div. 1991) ("Releases are contracts whose interpretation is governed by principles of contract law.").

42. The fraud itself may be actionable as well. *See* Capdeboscq v. Francis, 32 Media L. Rptr. 2462 (E.D. La. 2004) (allowing a fraud claim to proceed where plaintiffs, who posed with their breasts exposed, claimed that they were assured that the photo would not appear on a video cover for *Girls Gone Wild*).

43. The *Restatement (Second) of Torts* § 892B(2) (1979) provides thus:

> If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the expected invasion of harm.

44. M.G. Chamberlain & Co. v. Simpson, 173 Cal. App. 2d 263 (Cal. Ct. App. 1959).

45. *Id.* The court in *M.G. Chamberlain* elaborated thus:

> An apparent consent is not real or free when obtained by fraud. Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud. Having undertaken to make representations with respect to the facts, [parties are] bound by law to make an honest statement and not conceal any fact within their knowledge. *Id.* (citations omitted).

46. *Id.*

47. Noved Realty Corp. v. A.A.P. Co., 293 N.Y.S. 336 (N.Y. App. Div. 1937); Bank Elec. Co. v. Bd. of Educ., 305 N.Y. 119 (N.Y. App. Div. 1953) ("No duty rests upon a party to a contract to speak where silence does not constitute deception. Silence may, however, constitute fraud where one of the two parties to a contract has notice that the other is acting upon a mistaken belief as to a material fact.").

48. Braun v. Flynt, 726 F.2d 245 (5th Cir. 1984).

49. RESTATEMENT (SECOND) OF TORTS § 652Fb (1976); *see* Castagna v. W. Graphics Corp., 590 P.2d 291 (Or. Ct. App. 1979); Welch v. Mr. Christmas, Inc., 447 N.Y.S.2d 252 (N.Y. App. Div. 1982).

50. Dzurenko v. Jordache, Inc., 88 A.D.2d 816 (N.Y. App. Div. 1982) ("The use of the photograph in a form and forum other than that specified in the release may constitute a breach of the agreement among the parties. However, it does not constitute an invasion of plaintiff's right to privacy."); *see also* Stephano v. News Group Publ'ns, Inc., 470 N.Y.S.2d 377 (N.Y. App. Div. 1984).

51. Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83 (2000); Gillman v. Chase Manhattan Bank, 73 N.Y.2d 1 (N.Y. 1988).

52. Heyert v. Owens, No. 601786 (N.Y. Sup. Ct. June 19, 2006).

53. *Id.; see also* Marder v. Lopez, 34 Media L. Rptr. 1769, 1771 (9th Cir. 2006) (finding that a release was not unfair, in part because plaintiff was represented by counsel when she signed the release); Gelbman v. Valleycrest Prods. Ltd., 29 Media L. Rptr. 2434 (N.Y. Sup. Ct. 2001) (stating that, even assuming there was unequal bargaining power, plaintiff, a game show contestant who signed a release, must also show that the agreement was unfair).

54. Gatton v. T-Mobile USA, 152 Cal. App. 4th 571 (2007). Contracts of adhesion may be defined as:

> [s]tandard contracts [that] are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all.

Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).

55. *Gatton*, 152 Cal. App. 4th at 582–83.

56. MCCARTHY, *supra* note 9, § 10:30.

57. *Id.*

58. *Id.*

59. *See* Alvidrez v. Roberto Coin, Inc., 791 N.Y.S.2d 344, 346 (N.Y. Sup. Ct. 2005); Cory v. Nintendo of Am., Inc., 592 N.Y.S.2d 6 (N.Y. App. Div. 1993) ("Since written consent is all that the statute requires, consideration is not required.")

60. ALLEN E. FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.4, at 228 (3d. ed. 1999).

61. Shields v. Gross, 88 A.D.2d 846 (N.Y. App. Div. 1982).

62. Shields v. Gross, 58 N.Y.2d 338 (N.Y. 1983).

63. *Id.; see also* Alvidrez v. Roberto Coin, Inc., 791 N.Y.S.2d 344 (N.Y. Sup. Ct. 2005).

64. Faloona by Frederickson v. Hustler Mag., Inc., 799 F.2d 1000 (5th Cir. 1986).

65. RESTATEMENT (SECOND) OF CONTRACTS §§ 15–16 (1981).

66. Delan v. CBS, 458 N.Y.S.2d 608 (N.Y. App. Div. 1983).

67. FARNSWORTH, *supra* note 60, §12.7, at 781.

68. The amount of time one waits before breaching will affect the other party's reliance interest in the contract, and, thus, it will cost more to restore their financial loss. *Id.* § 12.1, at 758.

69. Virgil v. Time, Inc., 527 F. 2d 1122, 1124 (9th Cir. 1995).

70. *Id.*

71. *Id.* & n.6.

72. MCCARTHY, *supra* note 9, § 10:31.

73. Garden v. Parfumerie Rigaud, Inc., 271 N.Y.S. 187, 189 (N.Y. Sup. Ct. 1933). *But see* Tanner-Brice Co. v. Sims, 161 S.E. 819 (Ga. 1931) (holding that plaintiff had no cause of action where he gave an oral, gratuitous license allowing his name to be used in connection with defendant's retail stores and then later sought to revoke the license).

74. Arkansas, California, Delaware, Florida, Georgia, Guam, Hawaii, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, and Washington have passed anti-SLAPP legislation.

75. CAL. CIV. PROC. CODE § 425.16.

76. Doe v. Am. Prods., Inc., No. SC091723 (L.A. County Super. Ct. Feb. 15, 2007) (unpublished).

77. Hall v. Time Warner, Inc., No. BC343204, 2007 WL 1990389 (Cal. Ct. App. July 11, 2007) (unpublished).

78. *Id.* at 4.

79. *Id.* at 11–12.